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THE

PUNJAB RECORD,

OR

Reference Book for Civil Officers

CONTAINING

THE REPORTS OF CIVIL AND CRIMINAL CASES DETERMINED BY
THE CHIEF COURT OF THE PUNJAB AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM
THAT COURT, AND DECISIONS BY THE FINANCIAL
COMMISSIONER OF THE PUNJAB.

REPORTED BY

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JUDGES OF THE CHIEF COURT

1914.

CHIEF JUDGE :

THE HON. SIR ALFRED KENSINGTON, KT.

JUDGES :

THE HON. MR. JUSTICE D. C. JOHNSTONE.

" " " " H. A. B. RATTIGAN.

" " " " SHAH DIN.

" " " " W. CHEVIS.

" " " " H. SCOTT-SMITH—(*Officiating 1st Temporary Additional Judge from 14th March 1914*).

" " " " SHADI LAL—(*Officiating 2nd Temporary Additional Judge from 19th March 1914*).

" " " " W. A. LE-ROSSIGNOL—(*Officiating 3rd Temporary Additional Judge from 21st October 1914*).

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... .. No. 88 P. R. 1914.

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... .. No. 82 P. R. 1914.

ACCOUNTS.

Settled and balance struck—not objected to for years—cannot be re-opened.

Plaintiffs to whom, on a partition of the family property, the debt due to the family by defendants 1 and 2 had fallen, sued the latter for recovery of the amount due as per balance, Rs. 5,500, struck in May 1905 in the family account books and signed by the defendants, the words *bhol chuk* equivalent to "errors and omissions excepted" were written under the balance. This balance was struck on dissolution of a joint business which the family had been carrying on with defendants 1 and 2. Neither of the defendants had made any attempt up to date of institution of this suit in July 1910 to have these accounts overhauled or corrected. In signing the balance defendant 1 signed a sort of memorandum in which he admitted that Rs. 5,500 was due to the plaintiffs, promised to pay in 4 instalments within a year, promised interest and agreed that the debts and outstandings of the business were to be paid and realized, respectively, by defendants 1 and 2. Further, each party executed a sort of deed of release in favour of the other on the same date and in this the words *bhol chuk* did not occur—

Held that in the circumstances of the case the defendants 1 and 2 could not be allowed to go behind the settlement of 1905.

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ACT XIII OF 1855.

Compensation—distribution of, among the relatives of deceased—widow, grandmother, father, mother, and son adopted by widow after her husband's death—Joint Hindu family.

Held, that a son adopted by the widow after the death of the deceased is not a "child" of the deceased for the purpose of Act XIII of 1855.

7 Bom. H. C. R. 113-114, followed.

Held also, that the Court has under the Act full power to apportion the compensation among the members of deceased's family as it thinks fit, and that it was justified in not granting any of it to a grandmother to whom no loss was occasioned by the death.

Held further, that as plaintiff, the widow, was entirely dependent upon her husband and was left penniless by his death, the Court was justified in allotting to her $\frac{2}{3}$ rd of the compensation as against the father of deceased, who was himself earning Rs. 15 *per mensem* and had two sons living to whom he could look for support, if necessary.

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(1) If he loses all rights of collateral succession in his own natural family, custom often recognises his right to collateral succession in the family of his adoptive father.

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(2) Succession by—in his natural family—Bains Jats, Tahsil Garshankar, district Hoshiarpur.

See *Custom—(Succession) (10).*

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(3) Under customary law—has no *status* to challenge alienation made by his adoptive father of his ancestral property.

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ADOPTION.

(1) Suit for possession by adopted son, whose adoption is denied by other side, is governed by article 144, Limitation Act, and not by article 119.

See *Indian Limitation Act, 1908 (4).*

.. ... No. 81 P. R. 1914 (F. B.)

(2) Sister's son—Bajwa Jats, Nikodar Tahsil, Jullundur District—*onus probandi.*

See *Custom (Adoption) (3).*

... .. No. 90 P. R. 1914.

ADVERSE POSSESSION.

Adverse possession—by one co-sharer in joint holding—entry in Revenue Record of all co-sharers.

Plaintiffs sued for a declaration that notwithstanding that in the Revenue Records, defendants were shown as owning 89 $\frac{2}{3}$ rd shares out of 1,220 shares in *Khe-ut* No. 12, in reality defendants owned no shares and the plaintiffs based their claim not only on an assertion of title, but on an allegation of long adverse possession.

In 1891 certain persons, including some of the present plaintiffs, applied for partition of this very land and in doing so denied defendant's right to a share in it: they were told to bring a civil suit.

This they did on 6th April 1894, and that suit was ultimately dismissed in 1897 on the ground that plaintiffs had not yet acquired

ADVERSE POSSESSION—*concl.*

a title by adverse possession. In 1907 some defendants brought a suit for partition on the basis of the entries in the Revenue Records, plaintiffs objected that the entries did not represent the real facts and then filed the present suit. Plaintiffs were found to have been alone in possession since 1891 to date of suit February 1908.

Held, that possession of one co-sharer is ordinarily possession of all the co-sharers, but the co-sharer in possession can convert his possession into adverse possession by an overt act, showing unequivocally to the co-sharers that in future he intends to hold for himself alone and this adverse possession so begun cannot be stopped by the other co-sharers merely by affirmation that they are co-sharers or by mere applications for partition.

120 P. R. 1908, referred to.

The mere retention by the Revenue authorities of the names of the co-sharers, as such, after the overt act does not prevent limitation from running against them.

I. L. R. 29 Bom. 300, referred to.

Nor does a decree in their favour not accompanied by actual effective assertion of rights and taking of possession of these rights, help them.

9 Indian Cases 795, referred to.

Held also, that in the present case the overt acts, that is to say, the declarations of exclusive title in 1891 and 1894, were unmistakable, and that plaintiffs had accordingly acquired title by adverse possession before the date when the present suit was brought.

... .. No. 45 P. R. 1914.

AMENDMENT OF PLAINT.

Accidental omission of part of property in pre-emption suit.

See *Civil Procedure Code*, 1908 (11).

... .. No. 62 P. R. 1914.

ANCESTRAL PROPERTY.

Hindu Law—property inherited from maternal grandfather.

See *Hindu Law* (8).

... .. No. 92 P. R. 1914.

APPEAL.

(1) Lies from an order rejecting a plaint for non-payment of extra Court-fee.

See *Punjab Courts Act*, 1881 (2).

... .. No. 80 P. R. 1914.

(2) From order of remand by Divisional Judge, when admissible.

See *Civil Procedure Code*, 1908 (7).

... .. No. 85 P. R. 1914.

(3) From order directing compromise to be recorded and decree to pass in accord therewith.

See *Civil Procedure Code*, 1908 (5).

... .. No. 96 P. R. 1914.

ARAINS.

Hoshiarpur district—gift to one heir to exclusion of others.

See *Custom (Alienation)* (3).

... .. No. 11 P. R. 1914.

ARBITRATION.

(1) Immaterial irregularity in the proceedings—not sufficient grounds for interference on revision with a decree passed in accordance with an award of arbitrators.

See *Civil Procedure Code*, 1908 (19).

... .. No. 28 P. R. 1914.

(2) Award dealing with matters not referred to—Court cannot file award in part and give effect to it in part.

See *Civil Procedure Code*, 1908 (6).

... .. No. 30 P. R. 1914.

ASSIGNMENT.

Claim for damages for breach of contract—right of assignee to sue—Transfer of Property Act, IV of 1882, sections 3, 6 (c), 130—"actionable claim"—"mere right to sue."

Held, following *I. L. R. 36 Cal. 315 (F. B.)* that a claim for damages for breach of contract, after breach, is not an actionable claim within the meaning of section 3 of the Transfer of Property Act, but a "mere right to sue" within the meaning of section 6 (c) and cannot therefore be transferred.

... .. No. 106 P. R. 1914.

AWANS.

(1) *Tahsil Attock*—powers of alienation by sonless proprietor.

See *Custom (Alienation)* (2).

... .. No. 5 P. R. 1914.

(2) District Sialkot—adoption of daughter's son valid.

See *Custom (Adoption)* (1).

... .. No. 9 P. R. 1914.

(3) *Tallagang Tahsil*—power of alienation of sonless proprietor and proprietor with sons, distinguished.

See *Custom (Alienation)* (9).

... .. No. 72 P. R. 1914.

B

BAIRAGIS.

Of Kulu—marriage with agriculturist woman valid—succession of widow in preference to *Gara*.

See *Custom (Succession)* (6).

... .. No. 36 P. R. 1914.

BALANCE OF ACCOUNT

Struck years ago and not objected to, cannot be reopened.

See *Accounts*.

... .. No. 66 P. R. 1914.

BILOCHES.

Gumani—Muzaffargarh district—sister has preferential right of succession to collaterals in 5th degree.

See *Custom (Succession)* (12).

... .. No. 104 P. R. 1914.

BRAHMANIS.

(1) *Tahsil* Gujar Khan, Rawalpindi district, governed by custom.

See *Custom (Alienation)* (1).

... .. No. 2 P. R. 1914.

(2) Mauza Dheriala Saigan, *Tahsil* Gujar Khan, Rawalpindi district—governed by custom in matters of alienation.

See *Custom (Alienation)* (5).

... .. No. 23 P. R. 1914.

(3) Mauza Dangoh Khurd, *Una tahsil*, Hoshiarpur district—governed by custom in matters of alienation.

See *Custom (Alienation)* (6).

... .. No. 24 P. R. 1914.

BURDEN OF PROOF.

As to consideration for a sale effected by registered deed—where vendor has slept over his rights for a considerable time.

Plaintiff sued on 17th March 1908 for possession of land and house property as vendee under a sale-deed executed and registered in September 1900, the alleged vendor died in 1901 and mutation was made in favour of his widow, the present defendant, without objection by the plaintiff.

Held, following 68 P. R. 1900, that under the circumstances of the case the lower Courts were right in placing the *onus* of proving consideration for the sale on the plaintiff notwithstanding registration of the sale-deed.

... .. No. 58 P. R. 1914.

C

CAUSE OF ACTION.

Splitting of—

See *Civil Procedure Code*, 1908 (10).

... .. No. 4 P. R. 1914.

CIVIL PROCEDURE CODE, 1882.

SECTION 13.

Res-judicata—two suits for possession by mortgagees.

See *Res-judicata* (1).

... .. No. 12 P. R. 1914.

CIVIL PROCEDURE CODE, 1908.

(1) SECTIONS 2, 96 (1) AND 115.

An order rejecting a plaint for non-payment of extra Court-fee is a decree and consequently appealable.

See *Punjab Courts Act*, 1881 (2).

... .. No. 80 P. R. 1914.

CIVIL PROCEDURE CODE, 1908—*contd.*

(2) SECTION 11, EXPLANATION IV.

Res-judicata—*suit by mortgagee to redeem from sub-mortgagee who has purchased equity of redemption—subsequent suit by latter to redeem the mortgage.*

In 1858 one W. mortgaged his house to W. J. for Rs. 101. In 1873 W. J. sub-mortgaged half the house to R. R. S. for Rs. 50-8. In 1886 W. sold his equity of redemption to the sub-mortgagee R. R. S.

In 1909 the representatives of W. J. sued the representatives of R. R. S. for possession of the house by redemption of the sub-mortgage. In that suit the latter pleaded that the transaction was not a mere sub-mortgage, but a transfer of half the mortgage rights and also that they were owners of the equity of redemption. The question as to the genuineness of the alleged sale of the equity of redemption was put in issue and decided in favour of the defendants. It was, however, held that the plaintiffs could still redeem the sub-mortgage which had not been extinguished by the sale of the equity of redemption, but that the sub-mortgagee was entitled to some Rs. 426 as compensation for improvements. The defendants now sue as owners of the equity of redemption, to redeem the mortgage in favour of W. J., the defendants (plaintiffs in the previous suit) again plead that the alleged sale was not genuine and the plaintiffs are not entitled to redeem.

Held, that the question, whether the sale of the equity of redemption was genuine or not, was not *res-judicata*, as it was not a necessary issue for the decision of the previous case.

Held also, that the suit was not barred under Explanation IV of section 11 of the Code of Civil Procedure, by reason of plaintiffs (then defendants) not having claimed to redeem the mortgage of W. J. in the previous suit.

2 *All. L. J.* 278, distinguished: 17 *Cal. W. N.* 605 (*P. C.*), referred to.

... .. No. 102 P. R. 1914.

(3) SECTION 21.

Appellate Court will not allow an objection to the place of suing, where no failure of justice has been shown.

See Jurisdiction.

... .. No. 87 P. R. 1914.

(4) SECTION 47 AND ORDER 21, RULE 2.

Suit for a declaration that a decree has been satisfied and should not be executed against plaintiff.

Held, that a suit for a declaration, that a decree obtained by the defendant against plaintiff's father and others has been satisfied, so far as it concerned the plaintiff and his father, and consequently should not be executed against the plaintiff, does lie, and section 47, or Order 21, rule 2 of the Code of Civil Procedure is no bar to it.

16 *P. R.* 1910, explained and followed.

... .. No. 42 P. R. 1914.

CIVIL PROCEDURE CODE, 1908—*contd.*

(5) SECTION 96 (3) AND ORDER 13, RULE 1, CLAUSE (m).

Appeal from order recording a compromise and decree passed thereon—compromise in excess of authority and against minor's interests.

On a deed of compromise made by the guardian *ad litem* of the minor defendant-respondent and the agent of the major defendant-respondent being presented in the Appellate Court by the plaintiff-appellant, the Divisional Judge, being of opinion that the compromise was for the benefit of the minor, sanctioned it and passed a decree in accordance therewith—the defendants appealed to the Chief Court.

Held, that the order of the Divisional Judge was one directing the compromise to be recorded within the terms of Order 23, rule 3, and an appeal against it was competent under clause (m) of Order 13, rule 1, notwithstanding that the order directed at the same time that a decree be passed in accordance with the compromise, and that such a decree was accordingly passed.

Held also, that as the compromise was in excess of authority in regard to the major appellant and was entirely against the interests of the minor appellant, the order recording the compromise and the decree based thereon must be set aside.

... .. No. 96 P. R. 1914.

(6) SECTION 101 (f) AND SCHEDULE II, PARAS. 20 AND 21.

Arbitration without intervention of Court—where award decides matters not referred to arbitration.

On agreement of the parties to refer to arbitration an award was delivered, but it decided certain matters which had not been referred to arbitration. On application under paragraph 20, schedule II of the Code of Civil Procedure, that the award be filed in Court, the Court held that the matters not referred to arbitration were separable from the rest of the award and passed a decree for the latter only.

Held, that paragraph 21, schedule II of the Code does not authorise a Court to file an award in part and to give effect to an award in part, and that the Court should have refused to file the award.

84 P. R. 1907, I. L. R. 27 All. 526 and I. L. R. 29 Mad. 303, referred to.

15 Cal. L. J. 110 distinguished.

Held also, that in proceedings under paragraphs 20 and 21, schedule II of the Code, a plea of acquiescence cannot be entertained.

... .. No. 30 P. R. 1914.

(7) SECTION 105 AND ORDER 13, RULE (1) (u).

Order of remand on point of custom—when appealable—Punjab Courts Act, XVIII of 1881, section 10, as amended by Punjab Act, I of 1912 Certificate of Divisional Judge in cases of orders of remand.

In this suit the collaterals of one A. sued for a declaration that the alienations effected by him, had been made without

CIVIL PROCEDURE CODE, 1908—*contd.*

necessity and consideration and should not affect their reversionary rights. One of the pleas raised by the alienee was that A. was governed by his personal law and not by agricultural custom and therefore had full powers of alienation. The first Court found on this point in favour of the alienee and dismissed the suit. The Divisional Court on appeal reversed this decision, holding that A. was governed by agricultural custom by which his power of disposition was restricted and remanded the case under Order 11, rule 23 of the Code of Civil Procedure for decision of the merits. The alienee appealed to the Chief Court from the order of remand.

Held, that there can be no appeal under Order 11, rule 23 of the Code of Civil Procedure from a Divisional Judge's order of remand, if that order is based upon a finding of fact only: but that an appeal is competent if the preliminary point involves a question of law which would allow of a second appeal, if the order appealed from were a decree and not a mere order.

I. L. R. 8 Cal. 674, *I. L. R.* 19 Mad. 422, 109 *P. R.* 4887, and 1 *P. R.* 1903 (*F. B.*) referred to.

Held also, that as in this case the question involved was one of custom and the appellant would have the right of a second appeal from the decree of the Appellate Court *only* if he were to obtain from the Divisional Judge a certificate under subsection (3) of section 40 of the Punjab Courts Act, it could not be said definitely that an appeal would lie from the decree of the Appellate Court, and consequently no appeal was competent from the order of remand under Order 43, rule (1) (c), Civil Procedure Code.

Held further, that no certificate could have been granted by the Divisional Judge in this case as section 40 (3) of the Punjab Courts Act applies only to appeals from "decrees" and not to appeals from "orders."

... .. No. 85 P. R. 1914.

(8) SECTION 113.

Reference to Chief Court—reasonable doubt—interest—Act XXXII of 1839.

Held, that a reference can only be made when the Court making the reference entertains a reasonable doubt, and when the Chief Court has already decided the point of law involved in a published judgment, it cannot be said that any reasonable doubt exists as to that point of law.

Held also, following 55 *P. R.* 1901 and 101 *P. R.* 1901 that in the absence of a contract to pay interest, it can only be allowed when demand has previously been made in accordance with the provisions of Act XXXII of 1839.

I. L. R. 30 Bom. 226, referred to.

... .. No. 8 P. R. 1914.

CIVIL PROCEDURE CODE, 1908—*contd.*

(9) SECTIONS 144, 151.

Restitution—right of appeal.

R. C. and R. S. obtained an *ex parte* decree against S. P. and others for Rs. 5,627 on 20th June 1904 from the Court of the District Judge, Delhi. This was eventually set aside by the Chief Court as against S. P. on the 16th May 1906. The suit as against S. P. was finally dismissed by the first Court on 8th December 1906, and this decree was upheld by the Chief Court on 31st October 1907. Meanwhile, R. C. and R. S. took out execution of their *ex parte* decree of 20th June 1904 and the share of S. P. in a village in the Gurgaon District was sold on 28th May 1906 and purchased by A. S., a minor. The sale was confirmed on 9th July 1906 and R. C. and R. S. withdrew Rs. 2,714-12-0 out of the purchase money deposited in Court. A. S. got possession of the property purchased in June 1907. In April 1908 S. P. sued R. C. R. S., and A. S. for possession of his share in the Gurgaon property and the Divisional Court gave him a decree on 26th March 1909, conditional on his depositing Rs. 2,714-12-0 for payment to A. S.—S. P. paid this sum and got possession. On 14th October 1909 S. P. applied to the Court at Delhi for restitution of the Rs. 2,714-12-0 from R. C. and R. S. but the suit was dismissed on the ground that section 144, Civil Procedure Code, under which the application had been made, did not apply. On appeal to the Chief Court—

Held, that section 144, Civil Procedure Code, had no application and no appeal lay. The only restitution, to which S. P. was entitled was restitution of his share in the Gurgaon property and he had already obtained possession of this.

Held also, that as the order of the District Judge, Delhi, was not on the face of it perverse or illegal the Chief Court would not on revision interfere with his order under section 151, Civil Procedure Code.

... ..

No. 10 P. R. 1914.

(10) ORDER 2, RULE 2.

Splitting of causes of action—novation.

C. D. was mortgagee under a deed which provided, *inter alia*, that the mortgagors were to remain in cultivating possession, and that they were to pay to C. D. $\frac{1}{4}$ th of the produce by way of interest. The deed further recited that, if the mortgagees failed to pay the $\frac{1}{4}$ th share of the produce to C. D., he would have the right to take possession of the land mortgaged. The deed did not recite that, if the produce by way of interest was not paid, C. D. might recover the unpaid interest. It appeared that in 1897 C. D. sued the mortgagors and obtained a decree for the value of produce then due, in lieu of interest: he did not claim possession. In the present suit on further default C. D. sued the mortgagors for possession and a certain sum on account of produce. In their pleas the defendants stated, *inter alia*, that they had failed to pay produce in *Kharif* 1907 and *Rabi* 1908, but had paid before these harvests.

CIVIL PROCEDURE CODE, 1908—*contd.*

Held, that the present suit was barred under Order 2, rule 2, Civil Procedure Code, 1908, and that the fact that the mortgage-deed did not specifically give C. D. the right to sue for the produce on default did not take away his inherent right so to do.

Held further, that the admission by the mortgagors of payment of produce between the date of the previous decree and the year 1907 did not operate to do away with the bar created by the previous suit under Order 2, rule 2, Civil Procedure Code, or to create a new cause of action to sue for possession in terms of the mortgage, inasmuch as it was not open to the parties *inter se* to override the rule as to splitting of causes of action.

19 P. R. 1910, followed.

28 P. R. 1907, I. L. R. 23 Bom. 348 and 8 Indian Cases 445, referred to.

... ..

No. 4 P. R. 1914.

(11) ORDER 6, RULES 1, 2 AND 17.

Amendment of plaint—accidental omission of part of the property in a pre-emption suit—date of institution of suit, where amendments are allowed.

On 7th April 1908 a property was sold consisting of 41 *kanaals* 18 *marlas* of land, the second floor of a house, share in a well and share of *shamilat*. On 30th March 1909 a suit for pre-emption was brought, but in the plaint the property asked for was described merely as 41 *kanaals* 18 *marlas* of land. On 12th May 1909 plaintiff applied for leave to amend saying, he had not intended to renounce any part of the claim but had by a *kitabi ghalti* omitted the house. The Court sanctioned the amendment and it was made. Still the share of the well and of *shamilat* was left out. On 4th February 1910 this defect was pointed out by vendee's pleader and the plaint was on same day returned for amendments and put in finally fully amended on 16th February 1910.

Held, that Order 6, rule 17, allows amendment of any part of a plaint, provided the amendment does not alter the character of the suit or introduce a different cause of action.

Held also, that this was a case of inadvertence and misdescription of property claimed and not of an intentional omission, and the amendments were accordingly admissible.

I. L. R. 33 Bom. 644, I. L. R. 17 All. 288, I. L. R. 33 All. 616, I. L. R. 36 Mod. 378, 7 P. R. 1896, and 10 P. R. 1909, referred to.

Held, further that where a plaint has been rightly amended the date of institution of the claim is the date of presentation of the original, and not the amended, plaint.

I. L. R. 9 Bom. 373 and I. L. R. 19 Bom. 320, referred to.

... ..

No. 62 P. R. 1914.

CIVIL PROCEDURE CODE, 1908—*contd.*

(12) ORDER 7, RULE 6.

Plaint must show grounds upon which exemption from law of limitation is claimed.

See *Indian Limitation Act*, 1908, (1)

... .. No. 83 P. R. 1914.

(13) ORDER 7, RULE 11 (b).

Rejection of plaint when plaintiff fails to make up deficiency in Court fees.

See *Indian Court Fees Act*, 1870 (3).

... .. No. 35 P. R. 1914.

(14) ORDER 20, RULE 13.

Suit asking Court to administer the estate of a deceased person, and paying plaintiff her share is a suit for accounts.

See *Indian Court Fees Act*, 1870 (1).

... .. No. 100 P. R. 1914.

(15) ORDER 21, RULE 3, AND ORDER 41, RULE 4.

Decree against defendants on ground common to all—appeal by all defendants—death of one of them—failure to bring his representative on record within limitation—abatement.

A number of defendants against whom a decree had been granted by the lower Appellate Court instituted an appeal to the Chief Court. One of them subsequently died and no application was made to bring his representatives on the record until after the period of limitation had expired. The decree proceeded on a ground common to all defendants.

Held that, as under Order 41, rule 4 of the Code of Civil Procedure, it was open to any one of the defendants to appeal to the Chief Court, against the decree of the lower Appellate Court, and the Court would have been empowered to reverse or modify the decree in favour of all the defendants, abatement of the appeal in respect of one of the appellants did not involve the dismissal of the appeal of the remaining appellants.

I. L. R. 22 Bom. 748, *I. L. R.* 27 Bom. 284, and *I. L. R.* 25 All. 27, referred to.

... .. No. 88 P. R. 1914

(16) ORDER 21, RULE 63.

Whether judgment debtor is a party to the execution proceedings, and can maintain a declaratory suit.

P. M. and S. R. obtained a decree against C. R. and L. D. On 9th March 1910, L. D., being then dead, P. M. applied for execution, and certain shops and a house belonging to L. D. were attached. On 2nd June 1910 the minor sons of L. D. applied to the executing Court urging, *inter alia*, that the mortgage of the attached property in favour of D. D. was null and void. On 8th June 1910 D. D. lodged an objection urging that the attached property had been mortgaged to him and should be sold subject to the mortgage charge. On this notice issued both to the judgment-debtors and to the decree-holders. The latter admitted the mortgage was null and void. On 10th October 1910 the executing Court allowed the objection of D. D. and

CIVIL PROCEDURE CODE, 1908—*contd.*

remarked that the judgment-debtors could bring a regular suit if so advised. On 23rd December 1900 the present suit for a declaration that the property was liable to attachment free of the mortgage charge was brought on behalf of the minor sons of L. D. and it was pleaded for the plaintiffs that the mortgage which was effected by their uncle C. R. was not binding on them.

Held, that it is a question of fact in each case whether a judgment-debtor is a party to objection-proceedings and that as the order of 10th October 1910 by the executing Court allowing the objection of D. D. in spite of the protests of the judgment-debtors was an order passed against them, they must be regarded as parties to the execution proceedings and they had therefore a perfect right under Order 21, rule 63 of the Code of Civil Procedure, to bring the present suit.

I. L. R. 15 Col. 674, and *I. L. R.* 11 Bom. 114, distinguished.

Held further, that even if they were not parties to the objection-proceedings, there was no reason why their right to bring a declaratory suit should be denied.

... .. No. 84 P. R. 1914.

(17) ORDER 41, RULE 4.

Appeal by some only of the plaintiffs against whom a decree has been passed on a ground common to all.

See *Indian Contract Act*, 1872 (3).

... .. No. 63 P. R. 1914.

(18) ORDER 41, RULE 20.

Court's power to add parties—discretionary—not affected by limitation—but not exercised in case of extreme neglect.

Held, that the law of limitation has no application to action taken by the Court under Order 41, rule 20 of the Code of Civil Procedure.

I. L. R. 13 All. 78, *I. L. R.* 14 All. 151 (F. B.), *I. L. R.* 15 Mad. 362 (F. B.), *I. L. R.* 33 Cal. 329, (1893) All. W. N. 35, *I. L. R.* 10 Cal. 445, 8 P. W. R. 1911 and 12 Cal. W. N. 625, referred to.

Held, however, that the power to take action under Order 41, rule 20, is discretionary and should not be exercised in a case of extreme neglect.

... .. No. 79 P. R. 1914.

(19) SCHEDULE II, CLAUSES 17—19.

Reference to arbitration made by Court—appeal from decree—decision.

The parties having referred their dispute to certain arbitrators plaintiff-respondent made an application to have the award filed. It was subsequently found that the award was defective and on this the parties having agreed to abandon the reference to the original arbitrators made a joint application to the Court appointing certain other arbitrators and praying that the Court would direct these new arbitrators to file an award and the Court made the necessary order and eventually passed a decree in accordance with the award.

Held, that although the subsequent joint application to the Court was not numbered and registered as a newly instituted suit (as it should have been) the award was made on a reference by the Court

CIVIL PROCEDURE CODE, 1908—*concluded*.

(*vide* Civil Procedure Code, Schedule II, Clauses 17-19) and consequently no appeal was competent against a decree made in accordance with it.

9 P. R. 1913, followed.

Held also, that the existence of certain immaterial irregularities in the proceedings was not sufficient ground for interference on revision.

... .. No. 28 P. R. 1914.

COLLATERALS.

More distantly related than fifth, or at all events, seventh degree must prove preferential claim to daughter in succession to ancestral property.

See *Custom (Succession)* (8)

... .. No. 41 P. R. 1914.

COLLUSIVE SUIT.

In pre-emption cases.

See *Pre-emption* (6)

... .. No. 103 P. R. 1914.

COMPANIES.

(1) Compulsory winding up of a Banking Company—when justified—appointment of provisional liquidator.

See *Indian Companies Act*, 1882. (1)

... .. No. 31 P. R. 1914.

(2) *Winding up—contributories—contract for taking shares induced by fraud—avoidance of contract in winding up proceedings.*

Held, that a shareholder who has made no attempt to avoid his contract for taking shares before the date when application was made to the Court for the compulsory winding up of the Company cannot be relieved from his liability as a contributory in the winding up proceedings on the ground that he was induced to enter into the contract by fraud.

7 E and B. 356 and 1 Ch. 365, referred to, also Buckley's Companies Act (1902), p. 130, and the Laws of England, Vol. V., p. 131.

... .. No. 69 P. R. 1914.

(3) *Resolution of company for voluntary winding up brought to notice of Court while application for compulsory winding up was pending—locus standi of liquidators appointed by company to appeal against order for compulsory winding up.*

After a petition had been presented by certain creditors for the winding up by the Court of the People's Bank and the 14th November 1913 had been fixed for the hearing of the said petition a meeting of the shareholders was held on 9th November 1913 and a resolution passed to the effect that the company should go into voluntary liquidation and that the present appellants should act as liquidators. This resolution was brought to the notice of the District Judge on the 14th November by an application addressed to him by the appellants which was placed on the record and the District Judge with this before him and after full consideration of the facts decided to

COMPANIES—*concl.*

direct a *compulsory* winding up by liquidators appointed by him. The liquidators appointed by the Company appealed against this order.

Held, that they had no *locus standi* to appeal against the District Judge's order for compulsory winding up.

... .. No. 73 P. R. 1914.

COMPENSATION.

For death caused in Railway accident—distribution of compensation among the relatives of deceased.

See *Act XIII of 1855*.

... .. No. 52 P. R. 1914.

COMPOUNDING CRIMINAL OFFENCE.

Promote given for purpose of—is void.

See *Indian Contract Act* (2).

... .. No. 39 P. R. 1914.

COMPROMISE.

Appeal from decree passed in accord with a compromise in excess of authority and against minor's interest.

See *Civil Procedure Code*, 1908 (5).

... .. No. 96 P. R. 1914.

CONDITIONAL SALE.

Flaws in procedure for foreclosure under Regulation XVII of 1806.

See *Mortgage* (2).

... .. No. 57 P. R. 1914.

CONTRIBUTORY.

Cannot be relieved of his contract to take shares on ground of fraudulent inducement *after* winding up proceedings have begun.

See *Companies* (2).

... .. No. 69 P. R. 1914.

CUSTOM.

May be proved by overwhelming oral testimony of those governed by it—even where no instance is forthcoming.

See *Custom (Alienation)* (6).

... .. No. 24 P. R. 1914.

CUSTOM (ADOPTION).

(1) *Awans of Sathawal, Sialkot district—adoption of a daughter's son—Riwaj-i-am.*

Held, that the adoption of a daughter's son is valid by the custom governing Gurrae Awans of the Sialkot district.

... .. No. 9 P. R. 1914.

(2) Collateral succession by adopted son in adoptive father's family---
Jats—Jagraon *Tahsil*, Ludhiana district.

See *Custom (Succession)* (7).

... .. No. 40 P. R. 1914

(3) *Sister's son*—Bajwa Jats, *Nikodar tahsil*, Jullundur district.

Held, that it had not been proved that by custom among Bajwa Jats, *Nikodar tahsil*, Jullundur district, the adoption of a sister's son was valid and that the *onus* of proving its validity was upon the latter.

50 P. R. 1893 (*F. B.*) and Civil Appeal No. 418 of 1884 (unpublished), referred to.

... .. No. 90 P. R. 1914.

CUSTOM (ALIENATION).

(1) *Agricultural Brahmans of Tahsil Gujar Khan, Rawalpindi district, are governed by custom.*

Held, that agricultural Brahmans of *Tahsil Gujar Khan*, Rawalpindi district, are governed by the ordinary agricultural custom limiting the alienation of ancestral property.

56 P. R. 1909, followed.

125 P. R. 1908 and 1 P. R. 1910, distinguished.

... .. No. 2 P. R. 1914.

(2) *Awans of Attock tahsil—alienation by sonless proprietor not permissible in presence of collaterals.*

Held, that among Awans of *Attock tahsil* a sonless proprietor is not competent under the customary law to alienate the whole of his property by will in the presence of his first cousins without their consent.

15 P. R. 1907, 79 P. R. 1896, 49 P. R. 1898, 9 P. R. 1899; 8 P. R. 1906 and 46 P. R. 1900, referred to.

... .. No. 6 P. R. 1914.

(3) *Ancestral land—gift to one heir to exclusion of others—Arains—Hoshiarpur district.*

Held, that by custom among Arains of the Hoshiarpur district, a childless proprietor has no power to make a gift of his ancestral property to one reversionary heir to the exclusion of the others.

... .. No. 11 P. R. 1914

(4) *Hindu law—alienation of ancestral land—Khatri of Mauza Khairabad, Jullundur district.*

Held, that it had not been proved that Khatri traders of *Mauza Khairabad*, Jullundur district, were governed by agricultural custom

CUSTOM (ALIENATION)—*contd.*

in the matter of alienation of ancestral land, and, that the mere fact that they had owned the land in dispute for six or seven generations did not create a presumption in favour of their being governed by custom.

1 *P. R.* 1910, 59 *P. R.* 1908, 88 *P. R.* 1910 and 43 *P. R.* 1911, referred to.

... .. **No. 16 P. R. 1914.**

(5) *Brahmins of Mauza Dheriala Saigan, Tahsil Gujar Khan, Rawalpindi district—ancestral property—Hindu Law.*

Held, that the Brahmins of *Mauza Dheriala, Tahsil Gujar Khan, Rawalpindi district* are, in matters of alienation, governed by custom and that one of the most important tests in determining whether a certain caste is or is not governed by agricultural custom is, whether they form a compact village community or at least a compact section of the village community. In such cases there is a strong presumption in favour of the applicability of custom.

63 *P. R.* 1910, followed.

94 *P. R.* 1907, 125 *P. R.* 1908 (p. 569), 56 *P. R.* 1909, 87 *P. R.* 1909, 34 *P. R.* 1911, 1 *P. R.* 1910 and (1912) 13 *Indian Cases* 709, referred to.

... .. **No. 23 P. R. 1914.**

(6) *Brahmans of Mauza Dangoh Khurd, Una tahsil, Hoshiarpur district—Hindu Law.*

Held, that in matters of alienation a childless Brahman proprietor of *Mauza Dangoh Khurd* in the *Una tahsil* of the *Hoshiarpur district*, is governed by agricultural custom, and not by Hindu Law.

Held also, that a rule of custom may be established and held to be of binding force, even where no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence in its favour.

55 *P. R.* 1903 (*F. B.*) (p. 234) and 110 *P. R.* 1906 (*F. B.*) (p. 393), cited and followed.

34 *P. R.* 1911, referred to.

... .. **No. 24 P. R. 1914.**

(7) *Ancestral land—gift to daughter's son—Gil Jats—Tahsil Dasuya, Hoshiarpur district—suit for possession by collaterals after death of donor's widow—Limitation—Indian Limitation*

CUSTOM (ALIENATION)—*could*.

Act, IX of 1908, article 141—Punjab Limitation Act, I of 1900—Res judicata.

The suit was by reversioners for possession of ancestral land owned by one B. S. against the latter's daughter's son, who was in possession as donee of B. S. under a gift, dated 18th February 1887. B. S. died on 8th March 1894, his widow died on 7th November 1908 and this suit was instituted on 19th December 1908. In 1894 the present plaintiffs had brought against the present defendant and the widow of B. S. a suit for a declaration that a gift of another portion of B. S.'s property to the said defendant would not affect the reversioners' rights, which was finally decreed by the Chief Court. In that suit the defendant did not press his present plea that he was a *khatun damadi*.

Held, that the suit was governed by article 141 of the Limitation Act, and not by the Punjab Limitation Act of 1900, and was consequently within time.

90 *P. R.* 1904 (*F. B.*), 145 *P. R.* 1907, 33 *P. R.* 1911 (*F. B.*), followed.

62 *P. R.* 1910, referred to.

Held also, that the plea of *khatun damadi*, not having been pressed in the previous suit between the parties, must be treated as having been adjudicated on against the defendant-appellant.

Held further, that defendant-appellant had failed to prove that by the custom governing Gil Jats of *tahsil* Dasuya, Hoshiarpur district, a gift of ancestral property, in favour of a daughter's son, was valid in presence of near collaterals.

116 *P. R.* 1894, 15 *P. R.* 1886, 107 *P. R.* 1887 (*F. B.*), 92 *P. R.* 1904, 85 *P. R.* 1889, 85 *P. R.* 1900, 61 *P. R.* 1909 and *Roe and Rattigan's Tribal Law*, pp. 112 and 113, referred to and distinguished.

... .. No. 29 *P. R.* 1914

(8) *Locus standi of collaterals in 8th degree to challenge an alienation in favour of another collateral in same degree—Pelli Jats Shakargark Tahsil, Gurdaspur district—onus probandi.*

Held, that the general custom of the Punjab does not recognise the right of collaterals, however remotely related, to challenge alienations, and that (in the case of very distant collaterals) the onus of proving a right of control rests on them.

Held, that in this case, where the plaintiffs challenging an alienation were collaterals in the 8th degree, the onus of proving a special custom entitling them to do so was on them, and that they had failed to prove such custom.

75 *P. R.* 1898, 35 *P. R.* 1906, 24 *P. R.* 1912, and 96 *P. R.* 1913 referred to.

CUSTOM (ALIENATION)—*contd.*

Held also, that the fact that the alienation is in favour of a collateral, related in the same degree as the plaintiffs, would not have prejudiced the plaintiffs' right.

35 *P. R.* 1906, distinguished.
... .. **No. 37 *P. R.* 1914**

(9) *Awans—Tallagang Tahsil—sale by proprietor with sons living—Riwaj-i-am, Jhelum district.*

Held, that customary law recognises a distinction between the powers of alienation of a *sonless* proprietor and those of a proprietor who has sons, and that it had not been proved that among Awans of the Tallagang *tahsil* a proprietor who has sons has unlimited power to deal with ancestral property as he pleases.

88 *P. R.* 1911, 114 *P. R.* 1913, 8 *P. R.* 1906, 5 *P. R.* 1914, 81 *P. R.* 1894 and *C. A.* 446 of 1911 (unpublished), referred to.
... .. **No. 72 *P. R.* 1914**

(10) *Sahgal Khatris—Jullundur City—concerns to Muhammadanism—oral gift of property to wife—Muhammadan law.*

Mussammnat B., the widow of one A. S., a Sahgal Khatri of Jullundur City, gifted a house to the *Anjuman Hamayat-i-Islam*. The plaintiffs, collaterals of A.S., sued for a declaration that the gift should not affect their reversionary rights. The house was part of the property of A. S. and was included in an oral gift by the latter to his wife.

Held, that Sahgal Khatris, who have been living for a long time in the city of Ludhiana and have changed their religion and are dependent mainly on service and not on agriculture for their livelihood, even if not following Muhammadan Law strictly in matters of inheritance, cannot be presumed to follow agricultural custom whereby a proprietor cannot alienate ancestral land except for necessity, and that the plaintiffs had failed to prove that A.S. could not deal with his property at his will.

.. .. **No. 74 *P. R.* 1914.**

(11) *Powers of agricultural proprietors, Rohtak district.*

Held, that it had not been proved that by custom agricultural proprietors in the Rohtak district can dispose at pleasure of their ancestral land.

... .. **No. 76 *P. R.* 1914.**

(12) *Validity of transfer of reversionary rights by reversioners to one of their number—effect upon reversionary rights of bringing a suit for pre-emption—money compensation payable to pre-emptor in possession.*

On 18th April 1904 the widow of one Kasu sold her husband's land to her brother's son for Rs. 1,445-8-0. On 7th March 1905 Dula, a collateral of Kasu, sued for a declaration that the sale should not affect his reversionary rights and obtained a decree accordingly. On 15th February 1905 one Ram Singh sued for pre-emption and

CUSTOM (ALIENATION)—*contd.*

Gammun, another collateral of Kasu, brought a similar suit. Each pre-emptor obtained a decree for $\frac{1}{2}$ of the land sold, the price of the land being fixed at Rs. 940. Gammun did not pay the money into Court and so his suit stood dismissed. Ram Singh paid the entire amount and obtained possession of the whole land.

On 17th August 1905 all the reversionary heirs of Kasu including Gammun, executed a deed of release of their reversionary rights in favour of Dula. The widow of Kasu died in August 1909 and in October 1909 Dula sued the vendee from the widow and the sons of Ram Singh for possession of the land, impleading the other reversionary heirs as *pro forma* defendants. The first Court decreed the suit conditional on payment by plaintiff of Rs. 522 which amount was found to be for legal necessity. On appeal the Divisional Judge varied the decree to one for possession of $\frac{5}{8}$ th of the land in dispute on payment of $\frac{5}{8}$ th of the sum of Rs. 522, holding that Gammun by bringing a suit for pre-emption had admitted the validity of the sale and had therefore no rights left when he joined the other reversioners in the deed of release in favour of Dula and that therefore Dula could not claim to succeed to Gammun's $\frac{1}{8}$ th share. On appeal to Chief Court—

Held, agreeing with the Divisional Court, that by bringing a suit for pre-emption Gammun must be taken to have admitted that the sale was valid, and that consequently he had no rights of inheritance left in the subject-matter of the sale, which he could transfer to Dula by the deed of release, nor had Gammun's sons any rights in the property in dispute at the time of institution of the suit which they could relinquish in favour of Dula.

Held also, that although Ram Singh, father of defendants² 2 and 3 had to pay Rs. 940 before obtaining possession as a pre-emptor, the plaintiff in the present suit could not be called upon to pay to them more than Rs. 522 found to have been advanced by the original vendee to the widow for a necessary purpose.

Held further, that the transfer by the other reversioners of their reversionary rights to one of their number, *viz.* Dula, by the deed of release of 1905 was valid and that consequently the decree of the Divisional Court for possession of $\frac{5}{8}$ th of the land in suit was correct.

66 P. R. 1897 (F. B.), 67 P. R. 1909, I. L. R. 7 All. 353, and 51 P. L. R. 1903, distinguished.

... .. No. 78 P. R. 1914.

(13) *Gift of land in equal shares to several persons—whether joint tenancy with succession to survivor—reversion on death of donee to agnatic heirs of donor—distant collaterals whose suit for declaration in regard to gift was rejected—suit for possession after death of donee without lineal descendants—adverse possession.*

In or about the year 1865 one D. made a gift of the whole of his landed property in equal third shares to (1) his daughter J., (2) L. D., the son of J., and (3) K., the son of his other

CUSTOM (ALIENATION)—*conold*.

daughter K. B. (who had died prior to the date of gift). These gifts were unsuccessfully challenged by D.'s collaterals, their suit being dismissed on the ground that they were too remotely related to the donor to contest his action. D. died in 1870 and L. D. in 1877. The latter left no issue and the third share gifted to him passed on his death to his mother J. Upon the death of J. the collaterals brought the present suit in which they claim to recover the lands gifted to J. and her son L. D. from the widow of a son of the husband of J. by another wife, on the ground that on the death of J. and L. D. without lineal descendants the property reverted by customary law to the agnatic heirs of the donors.

Held, that the gift by D. did not establish a joint tenancy with remainder to the survivor and plaintiffs' suit was therefore not barred by reason of one of the donees, *viz.*, K., being alive.

Held also, that a joint tenancy is an estate of a highly technical nature of English conveyancing and that its principles appear to be unknown to the personal law of the parties.

I. L. R. 23 Cal. 670 (679) (P. C.), referred to.

Held further, that the decision in the previous suit for a declaration did not debar the plaintiff from claiming possession of the land gifted to J. and her son L. D. on death without lineal descendants, and that the possession of J. of L. D.'s land was not adverse to plaintiffs.

... ..

No. 89 P. R. 1914.

CUSTOM (ALLUVION AND DILUVION).

Village Girote, Tahsil Khushab, District Shahpur—Wajib-ul-arz—*qabza* malik loses his rights by submersion.

Held, that the *ala maliks*, defendants, on whom the *onus* lay had proved that a local custom exists in the village of Girote, Tahsil Khushab, District Shahpur, whereby a *malik qabza* whose land is submerged in the river loses all his proprietary rights in that land and on its re-appearance it becomes the property of the *ala maliks*.

98 P. R. 1894 (F. B.), 33 P. R. 1903, 15 P. R. 1904, Civil Appeal 1208 of 1907 (unpublished) and 19 P. R. 1876, 59 P. R. 1877 (F. B.), 96 P. R. 1879, 1 P. R. 1880, 152 P. R. 1883, 97 P. R. 1902, 80 P. R. 1905, 8 P. R. (Rev.)

and 4 P. R. (Rev.) 1912, referred to.

... ..

No. 18 P. R. 1914.

CUSTOM (ANCESTRAL PROPERTY).

Adoption—property inherited by adopted son—whether ancestral qua the latter's sons.

Held, that by custom property which comes to an appointed heir as such is not ancestral *qua* the latter's son, who whether

CUSTOM ANCESTRAL PROPERTY—*conold*.

born before or after the appointment of his father has consequently no *status* to challenge an alienation of such property by his father.

25 *P. R.* 1901, 66 *P. R.* 1908, 111 *P. R.* 1893, 12 *P. R.* 1892 (*F. B.*), 50 *P. R.* 1893 (*F. B.*), at page 231 and 25 *H. R.* 225, referred to.

9 *P. R.* 1893 and 51 *P. R.* 1906, distinguished.

... ..

No. 99 P. R. 1914

CUSTOM (DOWER).

Amount of—Khattars—Attock district.

Found that it was usual among Khattars of the Attock district to fix dower at very high amounts, but that there was in reality no intention on the part of the husband to pay these amounts nor expectation on the part of the wife that she would be paid such.

Civil Appeal 980 of 1894 (unpublished) referred to.

Found also, that by custom among the parties the amount of dower was not fixed at a particular sum and *held* that, having regard to the position of the husband and to the fact that the wife was a young woman of good family marrying a somewhat elderly man, who had already two wives living, the lower Court was justified in fixing the dower in this case at Rs. 10,000, of which Rs. 5,000 had been liquidated by presents of ornaments at the time of marriage.

Held also, that such part of the estate of plaintiff's deceased husband as is ancestral in the defendants' hands cannot be made liable for payment of any debt.

4 *P. R.* 1913 (*F. B.*) referred to.

... ..

No. 19 P. R. 1914.

CUSTOM (GRAZING RIGHTS).

Of non-proprietors in *shamilat* land—*Wajib-ul-arz*.

See Village Common Land.

... ..

No. 95 P. R. 1914.

CUSTOM (SUCCESSION).

(1) *Heirless estate—proprietors of the patti—Wajib-ul-arz—Riwaj-i-am—Jallundur tahail—extent of widow's estate in absence of collaterals.*

S., the last male proprietor of the land in suit, died childless leaving a widow, who succeeded to his land. On her death her brother's son (defendant) obtained possession and claimed to hold it under a will in his favour by the widow. Plaintiffs, the proprietors of the *patti*, sued for possession claiming to be entitled

CUSTOM (SUCCESSION)—*contd.*

to the property in the absence of collaterals of S., and that the will in favour of defendant was invalid.

Held, that the *onus* of proving a right of succession by custom lay upon the plaintiffs and they had failed to discharge that *onus* and that the entry in the village *Wajih-ul-arz*, restricting a widow's power of alienation, was only inserted in the interest of collaterals and had no effect, where there were none.

102 *P. R.* 1906, 18 *P. R.* 1910 and 137 *P. R.* 1908, followed.
2 *P. R.* (*Rev.*) 1911, referred to.

Also that the entry in para. 59 of the *Ricaj-i-am* of the Jullundur *tahsil* was not applicable to the case of a village or *patti* where the proprietors are of different tribes, and would not, in the absence of any instance in support of it, be sufficient proof of a custom entitling plaintiffs to succeed.

Held also, that a widow's estate is only limited for the benefit of reversioners, and where there are none, she is to all intents and purposes an absolute owner.

... .. No. 3 *P. R.* 1914.

(2) *Ancestral land—gift to son-in-law, who died leaving a grand-daughter as his only descendant—claim by donor's collaterals—Khattars of Tahsil Fattah Jang, District Attock.*

Held, that the rule regulating succession to property gifted to a son-in-law is that there must be failure of all *female* as well as *male* heirs in the donee's line before the collaterals of the donor can come in to claim the inheritance.

12 *P. R.* 1892 (*F. B.*), 84 *P. R.* 1909, 96 *P. R.* 1909, 102 *P. R.* 1909, 5 *P. R.* 1910, 68 *P. R.* 1911, 76 *P. R.* 1912 and Civil Appeal 1061 of 1909 (unpublished), referred to.

32 *P. R.* 1895 (*F. B.*), 129 *P. R.* 1893, 14 *P. R.* 1907, 104 *P. R.* 1907, 112 *P. R.* 1909 and 39 *P. R.* 1905, distinguished.

... .. No. 13 *P. R.* 1914.

(3) *Muhammadian Law—Jat agriculturists, Jullundur district—non-ancestral land—distant kindred.*

Held following 110 *P. R.* 1906 (*F. B.*) that in the absence of proof of any custom governing the succession, the case must be decided in accordance with the personal law which governs the parties.

Held, also, that by Muhammadan Law the plaintiff, as brother of the last holder's mother, had a preferential right of succession

CUSTOM (SUCCESSION)—*contd.*

to the defendant, the son of the grand-daughter of the last holder's great-great-grandfather.

134 P. R. 1907 (F. B.) and 90 P. R. 1912, referred to.

... .. **No. 17 P. R. 1914.**

(4) *Usmani Sheikhs, Gurgaon District—remote collaterals do not exclude daughters.*

Held, that no custom had been established among Usmani Sheikhs of the Gurgaon district, whereby collaterals in the 8th degree were entitled to exclude the daughter of the last male holder.

... .. **No. 21 P. R. 1914**

(5) *To property of adopted son—over which his adoptive father had an absolute power of disposal—rights of collaterals of adoptive father.*

Held, that the principle of reversion to the heirs of the donor or appointor is limited to property over which he had not unrestricted power of disposition, and that consequently the collaterals of the appointor could not succeed to the land of the appointed heir (on the latter's death without lineal descendants) where such land was not ancestral.

12 P. R. 1892 (F. B.), 117 P. R. 1906, 88 P. R. 1906, 63 P. R. 1912, 94 P. R. 1913 and Rattigan's Digest, article 55, referred to.

... .. **No. 27 P. R. 1914.**

(6) *Bairagis of Kulu—validity of marriage—widow excludes the Gura—Riwaj-i-am.*

Held, that in Kulu a Bairagi may marry an agriculturist woman by *Ganesh puja* and the minor restrictive rules of Hindu Law, such as the naming of certain classes into which a Bairagi may or may not marry cannot with propriety be applied in that district in the absence of proof of special custom.

I. L. R. 3 All. 738, I. L. R. 12 Mad. 72, 13, Mad. I. A. 497 (506), 24 P. R. 1880, and 135 P. R. 1881, referred to.

Held also, that in matters of succession the widow of a Bairagi of Kulu excludes the *Gura*.

... .. **No. 36 P. R. 1914.**

(7) *By appointed heir collaterally in adoptive father's family—Jats of Tahsil Jagraon, Ludhiana district—Riwaj-i-am.*

Held, that where an appointed heir loses all rights of collateral succession in his own natural family custom often recognises his right to collateral succession in the family of the person who appointed him heir.

103 P. R. 1909, referred to.

But held, that it had not been proved that by custom among Jats of Tahsil Jagraon, Ludhiana district, an appointed heir is disentitled to succeed collaterally in his natural family, and that consequently the ordinary rule applies, *viz.*, that he is not entitled to succeed collaterally in his adoptive father's family.

... .. **No. 40 P. R. 1914.**

CUSTOM (SUCCESSION)—*contd.*

(8) *Ancestral property—daughter or collaterals in 11th degree—onus probandi.*

Held, that under customary law, where collaterals more distantly related than the fifth, or, at any rate, the seventh degree, claim to succeed to ancestral property in preference to a daughter, the *onus probandi* is on them.

5 *P. R.* 1908 and 86 *P. R.* 1908, approved.

48 *P. R.* 1889 and 75 *P. R.* 1898, referred to.

... ..

No. 41 P. R. 1914.

(9) *Mother's right to life estate—similar to that of a widow—a mere development of her original right of maintenance.*

See *Punjab Pre-emption Act*, 1905 (5).

... ..

No. 46 P. R. 1914.

(10) *By adopted son in his natural family—Bains Jats, Tahsil Garhshankar, District Hoshiarpur—Riwaj-i-am—value of entry in.*

Held, that it had been proved in this case that among Bains Jats, tahsil Garhshankar, District Hoshiarpur, a man "adopted" into another family by customary appointment as heir loses all right to succeed to the estate of an ancestor in his natural family, if other descendants of that ancestor also exist.

68 *P. R.* 1898, and Civil Appeal 865 of 1903 (unpublished), referred to

Held also, that an entry in a *Riwaj-i-am* in which the custom of one part of a district, is carefully differentiated from that of the rest of the district, as in this case, deserves attention and has some weight.

Held further, that the plaintiffs contesting the adopted son's right to succeed in his natural family, were not prejudiced by the decision of the Chief Court in Civil Appeal No. 1415 of 1896, in a suit to which they were not parties, holding that the adopted son could not succeed collaterally in his adoptive father's family.

... ..

No. 55 P. R. 1914.

(11) *Will—ancestral and self-acquired property—daughters—collaterals in 3rd degree—Muhammadan Khattars, Attock District.*

Held, that by custom among Khattars of the Attock District daughters succeed to their father's self-acquired property in preference to collaterals in the third degree, but that in regard to ancestral property the will in favour of the daughters was not proved to be valid by custom, the initial presumption having been admitted to be in favour of the collaterals.

Quære whether the initial presumption in regard to succession to ancestral property, among Muhammadan tribes, is in favour of near collaterals or in favour of daughters.

31 *P. R.* 1867, 115 *P. R.* 1892, 31 *P. R.* 1893, 50 *P. R.* 1885, 47 *P. R.* 1896, 37 *P. R.* 1898, 61 *P. R.* 1906, 105 *P. R.* 1906, 119 *P. R.* 1907, 48 *P. R.* 1909, 56 *P. R.* 1909 and 19 *P. R.* 1912, referred to.

15 *P. R.* 1907 and 13 *P. R.* 1914, distinguished.

... ..

No. 97 P. R. 1914.

CUSTOM (SUCCESSION)—*concl.*

(12) *Collaterals, 5th degree—sister—Gurmani Biloches—Muzaffargarh District—Riwaj-i-am.*

Held, that the plaintiffs, collaterals in the 5th and 6th degree, had failed to prove that by custom among Gurmani Biloches, Muzaffargarh District, they had a preferential right of succession to a sister.

Held also, that the entry in the *Riwaj-i-am* in favour of the sister threw the *onus probandi* upon the collaterals.

Held further, that the plaintiffs had also failed to prove that the sister had lost her preferential right of succession by marrying outside the *khandan*.

... .. No. 104 P. R. 1914.

D

DAUGHTERS.

(1) Usmani Sheikhs, Gurgaon District—not excluded in inheritance by distant collaterals.

See *Custom (Succession)* (4).

... .. No. 21 P. R. 1914.

(2) Distant collaterals—more distant than 5th, or, at any rate, the 7th degree must prove that they have a preferential claim to daughter in succession to ancestral property.

See *Custom (Succession)* (8).

... .. No. 41 P. R. 1914.

(3) Succession of—to ancestral property in preference to collaterals—initial presumption among Muhammadan tribes.

See *Custom (Succession)* (11).

... .. No. 57 P. R. 1914.

DAUGHTER'S SON.

Gift to—of ancestral property by sonless proprietor among Gil Jats of *tahsil* Dasuya, Hoshiarpur district, not valid by custom in presence of near collaterals.

See *Custom (Alienation)* (7).

... .. No. 29 P. R. 1914.

DECREE.

An order rejecting a plaint for non-payment of extra Court-fee is a decree and consequently appealable.

See *Punjab Courts Act, 1884* (2).

... .. No. 80 P. R. 1914.

DISTANT COLLATERALS.

8th degree—do not exclude daughters in inheritance among Usmani Sheikhs—Gurgaon District.

See *Custom (Succession)* (4).

... .. No. 21 P. R. 1914.

DOWER.

When claimed as fixed, whether customary dower can be decreed.

See *Muhammadan Law* (4).

... .. No. 105 P. R. 1914.

E

ESTOPPEL.

(1) *Subsequent suit by person who acted as guardian ad-litem in previous suit and then omitted to set up his personal claims.*

One B. D., the *Mahant* of a shrine, made a gift of the property in suit to S. R., a minor—N. D. claiming to be a *chela* of B. D. brought a suit against the minor donee for possession of the property (G. R. acted for the latter as guardian *ad-litem*) and a decree was passed in favour of N. D., who thereon got possession of the property. G. R. now sues N. D. for possession of the property on the ground that he is heir to B. D. and as such entitled to the property—

Held, that the fact that plaintiff omitted in the previous suit to plead that he is heir of B. D., and that N. D., the then plaintiff, had no *locus standi* to contest the gift in favour of S. R. did not debar him from seeking to enforce his own alleged personal rights in the present suit.

(1899) *Cal. W. N.* 283, approved. ... **No. 1 P. R. 1914.**

(2) A reversioner who has brought a suit for pre-emption in respect of a sale must be taken to have admitted the sale to be valid.

See *Custom (Alienation)* (12). ... **No. 78 P. R. 1914.**

EVIDENCE.

A custom may be proved by overwhelming oral testimony of those governed by it—even where no instance is forthcoming.

See *Custom (Alienation)* (6). ... **No. 24 P. R. 1914.**

EXECUTION PROCEEDINGS.

Who are parties to.

See *Civil Procedure Code*, 1908 (16). ... **No. 84 P. R. 1914.**

F

FRAUD.

(1) Suit to set aside a decree obtained by fraud—fraudulent misrepresentation to Court that advertisement in a Calcutta newspaper would supply the defendant with notice.

See *Indian Contract Act*, 1872 (1) ... **No. 65 P. R. 1914.**

(2) Contract to take shares in a company induced by fraud cannot be rescinded *after* winding up proceedings have been taken.

See *Companies* (2). ... **No. 69 P. R. 1914.**

FURTHER APPEAL

From order of remand of the Appellate Court on point of custom—Necessity of certificate.

See *Civil Procedure Code*, 1908 (7). ... **No. 85 P. R. 1914.**

G

GARDEN.

Valuation of suit for land covered by—

See *Indian Court Fees Act*, 1870 (2).

No. 71 P. R. 1914.

GRAZING RIGHTS.

Of non-proprietors in *shamilat*.

See *Village Common Land*.

No. 95 P. R. 1914.

GUARDIANS AND WARDS ACT, 1890.

(1) *Application to Court for marriage of minor female ward—proper action of Court.*

Held, that District Courts should not assume direct responsibility under the Guardians and Wards Act for the marriage of minors for whom a personal guardian has been appointed under the Act.

L. L. R. 22 Bom. 509, referred to.

No. 98 P. R. 1914.

(2) SECTIONS 8—16.

Courts not to interfere with family affairs which are satisfactory.

One A. B., a Muhammadan, died, leaving a sister, two widows and one son by each, aged 6 and 3 years, respectively, and two minor daughters. He left also some 200 *highas* of land recorded after his death as owned by the two sons. The widows were on good terms and being of the peasant class, quite well able to look after the interests of their own children. The sister applied to be appointed guardian of both the persons and property of all four children of A. B. and on this the brother of the second husband of one of the wives also applied to be appointed guardian of that woman's child. The District Judge eventually appointed a Hindu Lambardar to be the guardian of the children's property.

Held, that the District Judge should not have entertained either of the applications and should not have interfered at all with the previous family arrangements which were quite satisfactory.

No. 93 P. R. 1914.

(3) SECTIONS 29, 30 AND 31.

Creditors cannot under section 30 object to a sale by a guardian merely on the ground that it was not authorised by the Court.

See *Indian Registration Act*, 1877 (1).

No. 75 P. R. 1914.

H

HIGHWAYS.

Land taken up by Government for roads on makbuza tenure—whether erection of octroi post on edge of road is a breach of condition of the tenure.

Held that, where land has been taken up by Government in accordance with the *makbuza* tenure obtaining in Delhi for a public

HIGHWAYS—*concl'd.*

road, it is not a breach of its conditions for Government to allow a Municipal Committee to erect an octroi post thereon, such erection being clearly for a public purpose.

... .. **No. 51 P. R. 1914.**

HINDU LAW.

(1) Brahmans of *Tahsil* Gujar Khan, Rawalpindi district—governed by custom.

See *Custom (Alienation)* (1).

... .. **No. 2 P. R. 1914.**

(2) Followed by Khatri of *mauza* Khairabad, Jullundur district, in matters of alienation.

See *Custom (Alienation)* (1).

... .. **No. 16 P. R. 1914.**

(3) Brahmans of *mauza* Dheriala Saigan, *tahsil* Gujar Khan, Rawalpindi district, not governed by—in matters of alienation.

See *Custom (Alienation)* (5)

... .. **No. 23 P. R. 1914.**

(4) Brahmans of *Manza* Dangoh Khurd, Una *tahsil*, Hoshiarpur district, not governed by—in matters of alienation.

See *Custom (Alienation)* (6).

... .. **No. 24 P. R. 1914.**

(5) *Maintenance of step mother after her son and her step-son have effected a partition—liability of latter.*

Held, that upon the weight of authority there was no difference between the two systems of Hindu Law, the *Dayabhaga* and the *Mitakshara*, as to the relative position of a step-mother and her step-son.

I Cal. L. J. R. 142 and *I. L. R.* 8 *Cal.* 537 (542, 543), and per contra *I. L. R.* 37 *Cal.* 214, *I. L. R.* 5 *Mad.* 29, *I. L. R.* 5 *Mad.* 32, *I. L. R.* 8 *Mad.* 107 (129) (*F. B.*) *I. L. R.* 4 *Bom.* 188, *I. L. R.* 2 *Bom.* 573 (614), *Bengal Law Reports, Supp. Vol. Pt. I.* p. 67 (*F. B.*), *I. L. R.* 16 *Alh.* 221 (224), 153 *P. R.* 1889, and *Trevelyan's Hindu Law* (1912) p. 374, referred to.

Held, accordingly, following *I. L. R.* 16 *Cal.* 758 (*P. C.*) decided on the *Dayabhaga* system, that, after partition between two sons, the plaintiff being the real mother of one only, could not claim maintenance from her step-son, although, as long as the estate remained joint, her maintenance would have been a charge upon the whole estate.

No. 47 P. R. 1914.

(6) *Brahmans of Mauza Jaula, Nawashahr tahsil, Jullundur district—succession—daughter's daughter's or paternal grand nephews.*

One J. S. originally acquired the land in suit, he died about the year 1881. After his death the land passed in the ordinary way to his widow H. D. and at settlement of 1885, when a *muafi* which had been held by J. S. was resumed, the settlement appeared to have been made with the widow, who was in possession. On 30th August 1903 the widow made a gift of the land to her daughter K.—Ruldu, the brother's son of J. S., brought a suit to contest the gift, but failed on the ground that he had no *locus standi* as the donee was, under Hindu

HINDU LAW—*contd.*

Law, the next heir. K. had a son A. C. who died in his mother's life-time, leaving a widow R. She also had three daughters K. D., P. D. and B. D. and on her death, mutation was effected in the name of her son's widow, R. This lady subsequently gifted the land to R. L., the son of her husband's sister B. D. This gift gave rise to a suit by the sons of Ruldu, but a compromise was effected between them and Ruldu, by which they shared the land in certain proportions. The two other sisters of A. C. then brought the present suit against the sons of Ruldu and Rup Lal for possession of two-thirds of the land originally acquired by J. S.

Held that, whether the property was acquired or ancestral, H. D.'s possession would be merely that of a widow and she could not by any act of donation on her part confer on the next heir, her daughter K., any greater or more extensive rights than she herself possessed. K., was under Hindu Law the heir of her father J. S., but she could not, when succeeding as such heir to her father, form the stock of a fresh descent and Ruldu's sons (who were *sapindas* of J. S.) would be entitled to succeed in preference to K.'s daughters, who could claim only as *bandhus* of their deceased grandfather.

... .. No. 77 P. R. 1914.

(7) *Sale by widow of her husband's land with consent of nearest reversioner—suit by more distant reversioners challenging the sale.*

Mussammat L., widow of one K. C., deceased, and S. D., first cousin of K. C., sold a portion of the land, left by him, to R. K.—Plaintiffs, who were more distant reversioners of K. C., brought the present suit for a declaration that the sale shall not affect their reversionary rights after the widow's death. The first Court held that, although the land was not ancestral, *quo* the plaintiffs, they, as collaterals of K. C., could contest the sale by his widow, that the sale was not for legal necessity, and that it was not validated merely by the consent of S. D., who was the nearest reversioner at the date of sale. On appeal the Divisional Judge agreed with the first Court that plaintiffs were the collaterals of K. C., and that the sale was not for legal necessity, but held, differing from that Court, that as the nearest reversioner of K. C. had consented to the sale, the plaintiffs could not challenge it.

Held, that an alienation by a Hindu widow of her deceased husband's estate without justifying legal necessity is not validated by the consent of the nearest reversioners unless

(a) in a case in which the alienation relates to a portion of the estate it is found on the facts of the case that such consent gives rise to a presumption either of the existence of necessity or of reasonable inquiry and honest belief as to its existence; or

(b) in a case where the alienation is of the *whole* estate, the consent is capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and consequent acceleration of the interest of the consenting heirs.

The case was remanded to the lower Appellate Court for re decision in accordance with the above principle.

HINDU LAW—*contd.*

I. L. R. 30 *All.* 1 (*P. C.*), explained. *I. L. R.* 40 *Cal.* 721 (*F. B.*) followed and *I. L. R.* 6 *All.* 116 (*F. B.*), *I. L. R.* 10 *Cal.* 1102 (*F. B.*), *I. L. R.* 17 *Cal.* 896, *I. L. R.* 21 *Mad.* 128, *I. L. R.* 25 *Bom.* 129, *I. L. R.* 31 *Mad.* 366 (*F. B.*), *I. L. R.* 32 *All.* 176, *I. L. R.* 34 *All.* 129, *I. L. R.* 34 *Bom.* 165, 13 *Bom. L. R.* 940, 14 *Bom. L. R.* 602, 17 *Cal.* W. N. 1062, *I. L. R.* 35 *Cal.* 939, 12 *Mad. L. T.* 325, 23 *Mad. L. J.* 363 46 *P. R.* 1912 (p. 171), *I. L. R.* 21 *All.* 71 (*P. C.*), and *I. L. R.* 19 *Cal.* 236 (*P. C.*), referred to; also Rama Krishna's Hindu Law, Vol. II (1913 edition), pp. 346—357.

No. 91 P. R. 1914

(8) *Joint Hindu family—succession to property inherited from maternal grandfather—ancestral property.*

One K. M. and his brother S. R. inherited a house from their maternal grandfather. S. R. died childless in January 1876 and K. M. had at that time a son living, *viz.*, K. C., the present plaintiff, and the question was whether on S. R.'s death the house became the sole property of his surviving brother K. M. by survivorship or whether it was ancestral property in which K. C., the son of K. M. would also have a share.

Held, that as the house did not come to the brothers K. M. and S. R. by descent from a lineal *male* ancestor in the male line it was not ancestral in Hindu Law, but was K. M.'s sole property on the death of S. R. which he could dispose of by will.

I. L. R. 29 *All.* 667 and 42 *P. R.* 1910 (*P. C.*) at page 128, followed.

I. L. R. 27 *Mad.* 382, differed from.

I. L. R. 25 *Mad.* 678 (*P. C.*) referred to; also Mulla's Hindu Law, paras. 31 (1) (b) and 182 (2), Mayne's Hindu Law, 7th Ed., pp. 344 and 768, and Trevelyan's Hindu Law, p. 232.

No. 92 P. R. 1914.

(9) *Joint family partnership—death of one of the partners—whether partnership dissolves—Indian Contract Act, section 253 (10)—partnership continued after death—Indian Limitation Act, IX of 1908, article 106.*

The plaintiffs' firm of B. L. H., together with the firm of G. R. J. D., entered into a partnership with M. K., defendant, by deed, dated 1st January 1901, under which the two firms were to supply the capital and M. K. was to act as manager, the profits being shared equally between the parties. The agreement was to remain in force for *three years* from the date of starting work. M. K.'s father G. M. by a separate bond stood security for all losses suffered by the two firms to the extent of his son's share.

The plaintiffs sued on the 22nd December 1910, alleging that the joint business was carried on up to the end of December 1907 and that thereafter business was only carried on for purpose of winding up and they prayed for accounts to be made up and for a decree against defendants M. K. and the representatives

HINDU LAW—*continued*.

of his father, since deceased, (they having settled up with the firm of G. R. J. D.) for any sum due to them or in the alternative (if the Court found that the partnership had not yet been dissolved) that it should be dissolved and accounts made up and a decree passed in accordance therewith. The defendants pleaded, *inter alia*, that the suit was barred by limitation, as the partnership had been dissolved more than three years before suit and further that the surety-agreement by the late G. M. had determined on the lapse of the three years for which the partnership was to continue, *i. e.*, on the 1st January 1904.

Held, that as the partnership-agreement was between (a) M. K. of the one part and (b) the two firms of B. L. H. and G. R. J. D. of the second part, and not between the five individuals who signed the deed in their personal capacities and as the three partners of the firm of G. R. J. D. constituted a joint Hindu family and the firm was consequently not dissolved by the death of one of the partners in July 1907, to whom one of the other partners succeeded by survivorship, the partnership in suit was not dissolved by such death.

The principle underlying section 253 (10) of the Indian Contract Act, explained.

Held also that, as all the parties agreed expressly or by necessary implication to continue the partnership as if no dissolution had taken place upon the aforesaid death, the suit was in any case not barred under article 106 of the Limitation Act.

2 *Ch.* 174 and *L. L. R.* 25 *Mad.* 26 (31, 32), referred to.

Held further, that the extension of the partnership could not extend the liability of the surety who was no party to such extension and that his liability consequently ceased on the expiration of the period of three years, originally fixed in the deed of partnership.

... .. No. 101 P. R. 1914.

HOLIDAYS.

Condition of service to work on holidays, not invalid.

See Master and Servant.

... .. No. 50 P. R. 1914.

I

INDIAN COMPANIES ACT, 1882.

(1) SECTION 134.

Petition for compulsory winding-up of a Banking Company—power of Court to appoint a provisional liquidator.

Held, that the power to appoint a provisional liquidator which is given to the Court by section 134 of the Companies Act is general and unqualified, but that this discretionary power must be exercised reasonably and in accordance with principles laid down by the Court.

Held also, that where a Banking Company has to admit that it has in all its branches suspended business, and that it must

INDIAN COMPANY ACT, 1882—*concl'd.*

inevitably go into liquidation, and that its only hope of salvation is that a new Company may be formed to take its place, such Banking Company is not merely "plainly and commercially" but also "technically" insolvent and a Court would be fully justified in taking action under section 134 and appointing a provisional liquidator, notwithstanding that the petition for compulsory winding up was opposed by the directors of the company concerned.

L. R. 2 Eq. Cases 231, *L. R. 3 Ch. App.* 162 and 11 *W. R. (Engl.)* 754 and 3 *Mew's Digest*, 1944, referred to.

... .. No. 31 P. R. 1914.

(2) SECTION 169.

Appeals—which lie to Divisional Court and which to Chief Court—limitation—extension of time for notice to respondent—appellant must act with diligence.

The orders of the District Judge declaring appellants to be contributaries were passed on the 16th January 1913, the appellants in appeal No. 244 applied for a copy on the 17th January and obtained it the same day and their appeal to the Chief Court was filed on the 5th February.

The appellants in appeal No. 243 did not apply for a copy of the order till the 28th January and they filed their appeal on the 4th February.

Held, that an appeal under section 169 of the Companies Act of 1882, lies to the Divisional Court unless the value exceeds five thousand rupees.

34 *P. R.* 1913, referred to.

Held also, that in neither appeal was there any reasonable prospect of notice of appeal being served on the respondents within three weeks of the passing of the order complained of, and, as in point of fact, such notice did not reach the respondent within that period, the appeals were barred by time, extension of time being only admissible when the appellant can show that he himself has been duly diligent.

95 *P. R.* 1908, 176 *P. L. R.* 1911, 19 *Mad. L. J.* 511 and 13 *Bom. L. J.* 528, referred to.

... .. No. 68 P. R. 1914

INDIAN CONTRACT ACT, 1872.

(1) SECTION 17.

Fraud—obtaining ex-parte decree by giving false address of defendant and notice by advertisement which defendant would not see—allegation of fraud in plaint of subsequent suit.

Plaintiff in his amended plaint in November 1909 sued for a declaration that he was proprietor of one of the houses in dispute and for possession of half of the other house and one-third of a shop. It was alleged in this plaint that defendants had fraudulently obtained an *ex-parte* decree on 19th June 1905 for possession of half of each of the houses and one-third of the shop against

INDIAN CONTRACT ACT, 1872—*contd.*

the plaintiff, by concealing the real facts and fraudulently secured execution of the decree in plaintiff's absence and without his knowledge.

It was found as a fact that the address of the plaintiff (the defendant in the previous suit) was falsely given as Calcutta and that at the request of the defendants (then plaintiff) notice was given in the form of advertisement in the *Englishman* and that this was done with the object of concealing from him the fact that a suit had been filed and to obtain a decree behind his back.

Held, that the *ex-parte* decree was secured by the fraudulent misrepresentation that the method of service adopted would supply the respondent with notice of suit and that this fraud was sufficiently indicated in the plaint.

Also that the appellant's action was clearly fraudulent within the meaning of section 17 of the Contract Act and the respondent was entitled to re-open the issues decided in the previous suit.

I. L. R. 11 *Bom.* 620 (613) (*P. C.*), *I. L. R.* 32 *Bom.* 255, *I. L. R.* 21 *Cal.* 612 and *I. L. R.* 37 *Cal.* 197, referred to.

... .. No. 65 P. R. 1914.

(2) SECTION 23.

Suit on Promote given partly in consideration for withdrawal of a criminal prosecution for a non-compoundable offence.

Held, that a promissory note, the object or consideration of which was wholly or in part the withdrawal of a prosecution for an offence which was in law non-compoundable, falls within the terms of section 23 of the Contract Act, and is void, notwithstanding that the accounts between the parties were fully gone into, and that the maker admitted his liability for the amount of the Promote.

I. L. R. 11 *Bom.* 566, *I. L. R.* 28 *Bom.* 326, 5 *Indian Cases*, 98, 16 *Cal.* W. N. 854, and 135 *P. R.* 1882, referred to.

I. L. R. 28 *Al.* 718, 9 *P. R.* 1906, and 31 *P. R.* 1911 distinguished.

... .. No. 39 P. R. 1914.

(3) SECTION 39.

Non payment of previous balance—whether other party justified to rescind the contract—appeal by two out of four plaintiffs—common ground—Civil Procedure Code, 1908, Order 41, rule 4.

The plaintiffs, members of a firm, claimed damages from the defendant Company on account of alleged breach of contract. The lower Court finding that plaintiffs were guilty of the breach, which put an end to the contract, dismissed the suit. Two of the four plaintiffs appealed to the Chief Court. The terms of the contract were delivery as required by plaintiffs, on payment of the amount due on delivery of Railway receipt. It appeared, however, that several deliveries of yarn were made without such cash payment and an account was made up on 11th April 1909 when a sum of about Rs. 2,000 was found due to the defendant. After 11th April and up to 2nd May 1909 further deliveries

INDIAN CONTRACT ACT, 1872—*contd.*

were made, of which cash payments were made on delivery of Railway receipts and then came a dispute about a consignment of 13 bales which resulted in the final rupture between the parties and the termination of the contract.

After the account was made up on 11th April plaintiffs made over to defendant first halves of currency notes for Rs. 2,000, but admittedly they withheld the second halves of those notes and consequently the payment was not completed, and the question was whether the defendant was justified in rescinding the contract on plaintiffs' refusal to deliver the second halves of those notes.

Held, that the failure by the plaintiffs to pay for the goods, which had at first been delivered on credit, was not a renunciation of the contract or such a refusal as would excuse performance of the contract on the part of the defendant under the terms of section 39 of the Contract Act.

I. L. R. 36 *Cal.* 617, *I. L. R.* 33 *Cal.* 477 (*F. B.*), *L. R.* 9 *C. P.* 208, *I. L. R.* 4 *Cal.* 252 and *I. L. R.* 9 *Mad.* 359, referred to.

Held also, that as the decree appealed from proceeds on a ground common to all the plaintiffs the Chief Court could deal with the whole decree, *vide* Order 41, rule 1 of the Code of Civil Procedure.

... .. No. 63 P. R. 1914,

(4) SECTION 43.

Joint tenants—liability of each to pay the whole rent—Civil Procedure Code, 1908, Order 1, rule 10—discretionary power of Court to order other tenant to be added as a co-defendant.

Held, that under section 43 of the Indian Contract Act, joint tenants are jointly and severally liable to pay the rent and it is open to the landlord to sue one or both of them.

I. L. R. 22 *All.* 307, *I. L. R.* 25 *Bom.* 378 (386), and 37 *P. R.* 1902, referred to.

12 *Cal. L. J.* 642, and 12 *Cal. L. J.* 591, distinguished.

Held also, that although the Court had discretionary power under Order 1, rule 10, of the Code of Civil Procedure to order the other tenant to be made a co-defendant, it was right in not making such an order when the whereabouts of the other tenant was not known.

... .. No. 107 P. R. 1914.

(5) SECTIONS 60 AND 74.

(a) Creditor's right to apply a payment of any lawful debt due from the debtor in absence of instructions.

(b) Stipulation to pay compound interest not at an enhanced rate, does not come within section 74.

See *Indian Evidence Act*, 1872.

... .. No. 82 P. R. 1914

INDIAN CONTRACT ACT, 1872—*conold.*

(6) SECTION 70.

Co-sharers— contribution towards expenses of litigation carried on by some co-sharers which benefited all.

Plaintiffs and defendants are co-sharers in a joint *khata*. The land formerly belonged to one K. S. and on his death was taken possession of by two trespassers. Plaintiffs recovered it from the trespassers by suit. Defendants subsequently applied to the Revenue authorities for partition and plaintiffs then brought the present suit for a declaration that defendants are not entitled to partition until they pay the plaintiffs a sum of Rs. 500 as their share of the expenses of the former litigation.

Held, following the principle laid down in *I. L. R. 21 Cal. 496 (P. C.)*, that plaintiffs not having been in any way authorised by the defendants to enter into the former litigation, in which expense had been incurred were not entitled to recover any portion of that expense from the defendants.

I. L. R. 30 Mad. 526, 118 P. R. 1888 and 70 P. R. 1900, referred to.

Held also, that section 70 of the Contract Act has no application to the case.

I. L. R. 11 All. 234 (242, 243), followed.

... .. **No. 61 P. R. 1914.**

(7) SECTION 253 (10).

Effect of death of partner in Hindu joint family partnership—principles underlying the section explained.

See *Hindu Law* (9).

... .. **No. 101 P. R. 1914.**

INDIAN COURT FEES ACT, 1872.

(1) SECTION 7 (IV) (f).

Valuation of a suit asking Court to administer the estate of a deceased person and paying plaintiff her share—suit for accounts—Civil Procedure Code, 1908, Order 20, rule 13—Suits Valuation Act, VII of 1887, section 8.

Held, that a suit asking the Court to administer the estate of a deceased person and paying plaintiff her share is a suit for accounts (*Code* rule 13, Order 20, Civil Procedure Code) falling within section 7, IV (f) of the Court Fees Act and plaint must bear *ad valorem* Court fee stamps according to amount at which the relief sought is valued therein.

Held also, that under section 8 of the Suits Valuation Act the value of the suit for purposes of jurisdiction is the same.

51 *P. R. 1897*, p. 229 (*F. R.*), *I. L. R. 10 Cal. 271 (282)*, and 68 *P. R. 1881*, referred to.

... .. **No. 100 P. R. 1914**

INDIAN COURT FEES ACT, 1872—*concluded*.

(2) SECTION 7 V, CLAUSES (b) AND (c).

Valuation of suit for land covered by a garden.

Held, that a suit for possession of land forming a garden and two houses must be valued, under section 7 V (c) of the Court Fees Act, according to the market value of the garden and houses, notwithstanding that the land under the garden is assessed to land revenue, and this valuation holds good equally for the purpose of jurisdiction.

100 P. L. R. 1904 and C. A. 929 of 1910 (unpublished), referred to.

... .. No. 71 P. R. 1914.

(3) SECTION 12.

An order rejecting a plaint for non-payment of extra Court-fee is appealable notwithstanding the provisions of this section.

See *Punjab Courts Act*, 1884 (2).

... .. No. 80 P. R. 1914

(4) SCHEDULE II, ARTICLE 17 (iii).

Suit for cancellation of a deed of release (faraghkhati)—consequential relief—Court-fee—Civil Procedure Code, 1908, Order 7, rule 11 (b).

Held, that a suit for cancellation of a deed of release (faraghkhati) and for any other relief to which plaintiff may be entitled is not covered by article 17 (iii), schedule II of the Court Fees Act, but must be stamped *ad valorem* on the amount at which plaintiff elects to value his relief.

I. L. R. 23 *Mad.* 490, I. L. R. 29 *Bom.* 207, 109 P. R. 1893, referred to.

I. L. R. 30 *Cal.* 788, distinguished.

Held also, that when plaintiff fails to make up the deficiency in Court fees as ordered by the Court, his plaint should be rejected under Order 7, rule 11 (b) of the Code of Civil Procedure.

.. .. No. 35 P. R. 1914!

INDIAN EVIDENCE ACT, 1872.

SECTION 34.

Entry in account book, not sufficient proof by itself—Indian Contract Act, IX of 1872, sections 60 and 74—appropriation of payment—compound interest—penalty.

Held that, under section 34 of the Evidence Act, a defendant cannot be charged with liability on mere entries in a book of accounts, however regularly kept.

Held also, that under section 60 of the Contract Act, in the absence of proof or circumstances indicating to which debt a payment is to be applied, the creditor may apply it to any lawful debt actually due and payable to him from the debtor.

INDIAN EVIDENCE ACT, 1872--*concluded*.

Held further, that a stipulation to pay compound interest, not at an enhanced rate, does not come within the terms of section 74 of the Contract Act.

I. L. R. 25 *All.* 159, 14 *Indian Cases* 283, and *I. L. R.* 25 *All.* 284, referred to.

... .. No. 82 P. R. 1914.

INDIAN LIMITATION ACT, 1908.

(1) SECTION 14.

Suit filed beyond period of limitation—plaint must show ground for exemption from law of limitation—Civil Procedure Code, 1908, Order 7, rule 6.

Plaintiffs sued for possession of certain land more than 12 years from date on which he was entitled to it under his mortgage deed. In his plaint he only mentioned that he had carried on previous litigation in the Revenue Courts for ejectment of the defendant. The first Court found that under the provisions of section 14 of the Limitation Act, the suit was within time. The Divisional Judge on appeal held that section 14 was inapplicable and that an alleged acknowledgment upon which plaintiff also relied for the first time in his Court did not come within the terms of section 19 of the Act. On further appeal to the Chief Court—

Held, that under Order 7, rule 6 of the Code of Civil Procedure, the plaintiffs were bound to shew in the plaint the grounds upon which exemption from the law of limitation was claimed and that as there was no mention in the plaint of the alleged acknowledgment of liability by the defendants, plaintiffs could not be allowed to rely on it.

I. L. R. 31 *Cal.* 195, followed.

10 *Bom. L. R.* 346, distinguished.

Held also, that the proceedings in the Revenue Courts did not bring the case within the purview of section 14 of the Limitation Act.

... .. No. 83 P. R. 1914.

(2) ARTICLES 49 AND 120.

Suit by one brother against another brother for recovery of half the jewelry and house left by the widow of a third brother.

Plaintiff sued his brother for recovery of half the jewelry and house left by the widow of another brother.

Held, that the suit was governed by article 120 of the Limitation Act, and not by article 49.

I. L. R. 21 *Cal.* 157 (*P. C.*), *I. L. R.* 19 *All.* 169, *I. L. R.* 31 *Mad.* 511 (*F. B.*) and *I. L. R.* 9 *Cal.* 79, referred to.

... .. No. 34 P. R. 1914.

(3) ARTICLE 106.

Whether applicable where a partner in a Hindu joint family partnership has died and the survivors agree to carry on the partnership.

See Hindu Law (9).

... .. No. 101 P. R. 1914.

INDIAN LIMITATION ACT, 1908—*conclld.*

(4) ARTICLES 119, 144.

Suit by adopted son for possession of immovable property.

Held, that when a plaintiff sues for possession of immovable property alleging that he is the adopted son of the last proprietor and his adoption is denied, his suit is governed, not by article 119 but by article 144 of the first schedule of the Limitation Act.

I. L. R. 13 *Cal.* 308 (*P. C.*), *I. L. R.* 20 *Cal.* 487 (*P. C.*), *I. L. R.* 22 *Cal.* 609 (*P. C.*) *I. L. R.* 20 *Mad.* 40, *I. L. R.* 26 *Mad.* 291 (*F. B.*), *I. L. R.* 24 *Bom.* 260 (*F. B.*), *I. L. R.* 25 *Cal.* 354, *I. L. R.* 27 *Cal.* 242, *I. L. R.* 24 *All.* 195, *I. L. R.* 26 *All.* 10, 71 *P. R.* 1901, 20 *P. R.* 1902, 68 *P. R.* 1903, 3 *P. R.* 1904, 1 *P. R.* 1907, 56 *P. R.* 1903 (*F. B.*) (pp. 244-247), *I. L. R.* 28 *All.* 727 (*P. C.*), *I. L. R.* 30 *Mad.* 308, 96 *P. R.* 1908, 14 *P. R.* 1911, *I. L. R.* 37 *Bom.* 513 (532-534), and *I. L. R.* 39 *Cal.* 118, 126 *P. R.* 1912 (*P. C.*), referred to.

... .. No. 81 *P. R.* 1914 (*F. B.*)

(5) ARTICLES 120, 125 AND 126.

Suit by son for a declaration that mortgage of a house made by his father and the widow of his father's brother shall not affect his reversionary rights—limitation.

Plaintiffs sued in February 1910 for a declaration that the mortgage-deed of a house, dated 4th April 1898, for Rs. 1,400 made by defendant 1, his father, and defendant 2, the widow of his father's brother, in favour of defendants 3 and 4 will not affect his reversionary rights—defendants 3 and 4, *inter alia* pleaded limitation. The first Court found that the suit was within time under article 125 of the Limitation Act, in regard to defendant 2's alienation and under article 126 in regard to defendant 1's alienation, but finding the other issues in favour of defendants dismissed plaintiff's claim. Plaintiff appealed to the Divisional Court and here the question of limitation was not again raised by the defendants-respondents and the Court finding the other issues in plaintiff's favour decreed the suit. The defendants-mortgagees appealed to the Chief Court—

Held, that article 125 of the Limitation Act was not applicable, as it applies only to *local* and comes in only when the suit is by the *first* reversioner.

Held also, that article 126 was inapplicable, as that only applies to suits "to set aside" a father's alienation and not to declaratory suits.

I. L. R. 13 *Cal.* 308 (*P. C.*), distinguished.

Held consequently, that the Court must fall back on article 120.

... .. No. 70 *P. R.* 1914.

(6) ARTICLE 141.

Applicable to suit by reversioners for possession, after death of widow of last male holder.

See *Custom (Alienation)* (7).

... .. No. 29 *P. R.* 1914.

INDIAN REGISTRATION ACT, III OF 1877.

(1) SECTION 17 (b).

Deed limiting a widow's power of alienating immovable property—registration—Guardians and Wards Act, VIII of 1890, sections 29, 30 and 31—sale by guardian without Court's permission—status of creditors to object.

One J. G. died leaving a good many liabilities and considerable assets. Shortly after his death his widow, as guardian of her minor sons, entered into an agreement with her husband's creditors. Two lists A. and B. were prepared and annexed to the agreement—list A. was a list of the creditors and B. of J. G.'s property, movable and immovable, and one clause of the agreement provided that the widow should not dispose of or alienate any of the property in list B. until the debts in list A. were paid off.

Subsequently the widow applied for and was appointed guardian to her minor sons under the provisions of Act VIII of 1890, and after that sold some of the property to one C. R., her brother-in-law.

Held, that the agreement between the widow and the creditors required registration as it purported to limit her right in immovable property and the sale to C. R. was consequently not invalid by reason of the agreement.

Held also, that the creditors of J. G. could not, under section 30 of the Guardians and Wards Act, object to the sale which had been accepted by the adult son of J. G., merely on the ground that it was not authorized by the Court.

Held further, that as there were apparently sufficient assets, after omitting the property in dispute, to meet the debts due from J. G. there could be no presumption of bad faith made against C. R. even if he bought the property for something less than its value.

... .. No. 75 P. R. 1914.

(2) SECTION 17 (2), (i) (v).

Unregistered compromise of a civil suit—admissibility in evidence.

The parties to a civil suit came to terms, and executed a written deed of compromise whereby they agreed to divide the various properties therein specified between themselves, the said properties being expressly allotted to one or the other, and to execute thereafter such document as might be necessary to effectuate their intentions. This deed of compromise was written on a paper which bore an eight-anna Court-fee stamp, and was addressed as a petition to the Court, the parties to it praying that as they had privately divided the properties between themselves, the Court might be pleased to dismiss plaintiff's suit in accordance with the terms of the said compromise: the Court examined the parties and dismissed the suit accordingly.

Held, following 27 P. R. 1906, that the deed of compromise did not require registration under section 17 (b) of the Registration Act and was admissible in evidence.

I. L. R. 20 All. 171 and *I. L. R.* 33 Mad. 102, referred to.

I. L. R. 13 Mad. 281, *I. L. R.* 37 Cal. 808 and *I. L. R.* 36 Cal. 193 (223), distinguished.

... .. No. 20 P. R. 1914.

INTEREST.

(1) In absence of contract—not chargeable, unless previous demand has been made under Act XXXII of 1839.

See *Civil Procedure Code*, 1908 (8).

... .. **No. 8 P. R. 1914.**

(2) Whether payable on mortgage by way of conditional sale, after date when the land was to be considered as sold—whether *post diem* interest should be allowed as damages.

See *Mortgage* (2).

... .. **No. 57 P. R. 1914**

(3) Allowable on a mortgage which was to be considered a sale on failure of paying interest for two years—*post diem* interest by way of damages.

See *Mortgage* (4).

... .. **No. 94 P. R. 1914.**

J

JATS.

Tahsil Jagraon, Ludhiana district—adopted son not shown to be entitled to succeed collaterally in his adoptive father's family.

See *Custom (Succession)* (7).

... .. **No. 40 P. R. 1914.**

JATS (GIL).

Tahsil Dasuya, Hoshiarpur district—gift by sonless proprietor of ancestral property to his daughter's son—not valid by custom.

See *Custom (Alienation)* (7).

... .. **No. 29 P. R. 1914.**

JOINT HOLDING.

Adverse possession by one co-sharer.

See *Adverse Possession*.

... .. **No. 45 P. R. 1914.**

JOINT TENANCY.

Practically unknown in India.

See *Custom (Alienation)* (13).

... .. **No. 89 P. R. 1914**

JOINT TENANTS.

Of a house—right of landlord to sue one of them for whole rent.

See *Indian Contract Act* (4).

... .. **No. 107 P. R. 1914.**

JURISDICTION.

Territorial—suit tried in wrong place—plea of want of jurisdiction—how dealt with in *Appellate Court*—*Civil Procedure Code*, 1908, section 21.

Plaintiffs, the members of a Firm at Lyallpur, sued defendants, the members of a Firm at Karachi, for Rs. 5,669, as balance due to

JURISDICTION—*contd.*

them on account of certain transactions connected with the sale of goods by the defendants as plaintiffs' commission agents. The plaintiffs alleged that the agreement as to the defendants acting as their commission agents at Karachi had been come to orally at Lyallpur and their suit was consequently brought there. The Lyallpur Court found that it had jurisdiction to try the case.

Held by the Chief Court on appeal, that plaintiffs had failed to prove that the alleged agreement had been entered into at Lyallpur and that consequently the lower Court had not jurisdiction to try the case.

Held, however, that although the suit was instituted in 1906, section 21 of the Code of Civil Procedure, 1908, was applicable to the appeal and finding that there had been no failure of justice, the objection as to the place of suing was disallowed and the decree of the lower Court upheld.

L. L. R. 22 Cal. 767 (779) (F. B.), referred to. No. 87 P. R. 1914.

JURISDICTION (CIVIL OR REVENUE COURT).

Punjab Tenancy Act, XVI of 1887, section 77 (3) (i).

Plaintiffs sued the defendants for possession of the land in suit for the purpose of using it as a threshing floor. Plaintiffs were admittedly occupancy tenants of other land of which the defendants were their landlords, and they (plaintiffs) claimed that it was in consequence of their holding their occupancy rights that they were entitled to use the land in suit (which was formerly *shamilat* land and had now passed to defendants on partition) as a threshing floor.

Held, that the suit was one between landlord and tenant arising out of the conditions on which the tenancy was held within the meaning of section 77 (3) (i) of the Tenancy Act and was consequently within the jurisdiction of the Revenue Courts.

L. L. R. 16 All. 181, referred to. No. 44 P. R. 1914.

K

KHATRIS.

Manza Khairabad—Jullundur district—follow Hindu law in matters of alienation.

See Custom (Alienation) (1). No. 16 P. R. 1914.

KHATTARS.

(1) Attock district—amount of dower.

See Custom (Dower). No. 19 P. R. 1914.

(2) Attock district—succession of daughters—collaterals in 3rd degree.

See Custom (Succession) (11). No. 97 P. R. 1914.

L

LAND ACQUISITION ACT, 1894.

(1) SECTIONS 18 AND 19.

Provisions in regard to reference to Court must be strictly observed—time limit—extension of—minority.

On 7th June 1912 the Collector made his award. On 11th July 1912 the respondents presented a vague petition on unstamped paper, which was returned as being unstamped and not specifying the field areas. On 23rd July Hakim, respondent, presented a written objection asking the Collector to review his award and grant him further compensation. This was rejected as time-barred and so was a subsequent petition filed by Hakim on 3rd August 1912. On 14th August 1912 Gairda, respondent, applied to the Collector practically for a review of his award which was rejected as time-barred. No further application, after the rejection of the unstamped petition of 11th July, was apparently made on behalf of the minor respondents Miran Bakhsh and Allah Ditta.

The Collector after rejecting the aforesaid petitions, however, ordered that they should be sent to the Divisional Court to be put up with other connected cases before him. The Divisional Court apparently regarded this order as a reference under sections 18 and 19 of the Land Acquisition Act, and acted on it.

Held, that the procedure prescribed in sections 18 and 19 must be strictly observed and that the Divisional Court had not jurisdiction to deal with the respondents' objections to the Collector's award—

- (1) because there was no application by any of the respondents asking the Collector to take action under section 18 of the Act,
- (2) because the petitions made to the Collector were time-barred,
- (3) because the Collector rejected the petitions and did not refer them under section 19 to the Divisional Judge, and
- (4) as regards the minor respondents, because there was no application at all before the Collector.

I. L. R. 30 Bom. 275 (285), referred to.

Held also, that the objection as to the jurisdiction of the Divisional Judge could be taken at any time.

Held further, that the period of limitation laid down in section 18 of the Act cannot be extended on the ground of minority.

... .. No. 64 P. R. 1914.

(2) SECTIONS 18, 19 AND 54.

Appeal to Chief Court from order of Divisional Court rejecting reference, as application to Collector was time-barred—signature to award.

Held, that an award which is signed "A. D. Land Acquisition Officer" is sufficiently signed for the purposes of the Land Acquisition Act.

123 P. R. 1908, distinguished.

Held also, that no appeal lies under section 54 of the Land Acquisition Act, from an order of the Divisional Court rejecting a reference

LAND ACQUISITION ACT, 1894—*concluded*.

under section 18, on the ground that the application to the Collector was time-barred under sub-section (2), clause (a) of the section.

L. L. R. 39 Cal. 393, followed.

Held also, that the Collector in accepting the application after the six weeks had expired could not bind the Government, nor was it open to him to waive an objection of the kind in question.

L. L. R. 30 Bom. 275 and Civil Appeal No. 276 of 1913 (unpublished), followed.

Held further, that the application to the Collector, being time-barred, could not form the basis of a reference under sections 18 and 19.

... .. **No. 48 P. R. 1914.**

LANDLORD AND TENANT.

Right of landlord to sue one of joint tenants of a house for whole rent.

See *Indian Contract Act* (4).

... .. **No. 107 P. R. 1914.**

LEASE.

Sub-letting—does not determine lease in absence of express condition to that effect.

See *Transfer of Property Act*, 1882 (2).

... .. **No. 33 P. R. 1914.**

LIMITATION.

(1) Laid down in section 18, Land Acquisition Act, for presenting an application to Collector, cannot be waived by the latter.

See *Land Acquisition Act*, 1894 (2).

... .. **No. 48 P. R. 1914.**

(2) Under section 18 of the Land Acquisition Act must be strictly observed—no extension allowable on ground of minority.

See *Land Acquisition Act*, 1894 (1).

... .. **No. 64 P. R. 1914.**

(3) Not applicable to action taken by Court under Order 41, rule 20, Civil Procedure Code.

See *Civil Procedure Code*, 1908 (18).

... .. **No. 79 P. R. 1914.**

(4) Plaintiff must shew grounds upon which exemption from law of limitation is claimed—plaintiff cannot rely upon grounds not so stated.

See *Indian Limitation Act*, 1908 (1).

... .. **No. 83 P. R. 1914.**

M

MAINTENANCE.

Cannot under *Mitakshara* be claimed by step-mother from her step-son after partition.

See *Hindu Law* (5).

... .. **No. 47 P. R. 1914.**

MAKBUZA TENURE.

Delhi district—conditions of.

See *Highways*.

... .. **No. 51 P. R. 1914.**

MASTER AND SERVANT.

Condition of service to work on holidays—enforcement of penalty for non-compliance.

The rules of service, under which plaintiff was engaged by the defendant in his press on monthly pay of Rs. 19, required the employee to work on holidays, including Sundays, in case of necessity, with liability to summary dismissal and forfeiture of 15 days' wages on refusal. Plaintiff failed to work on Sunday, the 19th May, when ordered to do so and was in consequence dismissed on Monday, the 20th.

Plaintiff claimed wages for 19 days, plus some overtime allowance, plus damages (pay for 15 days more) on dismissal, in all Rs. 22-4-9.

The lower Court held that servants could not be forced to work on a Sunday, it being a holiday under the Negotiable Instruments Act, and decreed pay for the whole month.

Held, that the contract under which plaintiff was bound to work on a Sunday, if so required, was valid and defendant was justified in dismissing plaintiff on the 20th May, but that the prescribed penalty of forfeiture of pay for 15 days could not be reasonably exacted.

... .. No. 50 P. R. 1914.

MINOR.

(1) Compromise on his behalf—not for his benefit—appeal.

See Civil Procedure Code, 1908 (5).

... .. No. 96 P. R. 1914.

(2) Court should not take responsibility for marriage of minor for whom a personal guardian has been appointed.

See Guardians and Wards Act, 1890 (1).

... .. No. 98 P. R. 1914.

MINOR AND GUARDIAN.

Court not to appoint guardians in cases where the family affairs are satisfactory.

See Guardians and Wards Act, 1890 (2).

... .. No. 93 P. R. 1914.

MINORITY.

No ground for extending period of limitation laid down in section 18 of Land Acquisition Act.

See Land Acquisition Act, 1894 (1).

... .. No. 64 P. R. 1914.

MORTGAGE.

(1) Two suits for possession by mortgagees—*res judicata*.

See Res judicata (1).

... .. No. 12 P. R. 1914.

(2) *Conditional sale—Regulation XVII of 1806—invalid proceedings for foreclosure—interest allowable on such a mortgage.*

Plaintiffs sued to redeem certain land mortgaged by a collateral of theirs to the defendants in 1883. Under the terms of the mortgage deed defendants got possession and very onerous stipulations were laid down as to interest, with a further condition that if the mortgage

MORTGAGE—*contd.*

money was not repaid within 3 years the land should be considered as sold to the defendants. In 1887 the mortgagees took proceedings under Regulation XVII of 1806.

Held, that the proceedings under Regulation XVII of 1806, were invalid—

(a) as no attempt was made to proceed against *all* of the heirs of the mortgagor.

51 *P. R.* 1892, referred to.

(b) as the notice-proceedings made no reference to section 7 of Regulation XVII of 1806.

21 *P. R.* 1895, 21 *P. R.* 1903 and 28 *P. R.* 1908, referred to.

(c) as the notice proceedings did not specify the amount to be paid to the mortgagor within the year of grace.

84 *P. R.* 1882, referred to.

Held also, that no interest should be allowed to the mortgagees except for the 3 years after which the land was to be considered as sold, there being no independent covenant as to interest after that period.

92 *P. R.* 1908, referred to.

Held further, that under the circumstances of the case *post diem* damages, being discretionary with the Court, must be refused.

72 *P. R.* 1892 and 95 *P. R.* 1902, referred to.

... .. No. 57 *P. R.* 1914.

(3) *Result of non payment of full consideration—where mortgagee states that he has received consideration prior to date of mortgage.*

Held, that the principle laid down in 59 *P. R.* 1907 (*F. B.*) does not apply to a case where the mortgagor states that he has received consideration at a time prior to the mortgage, whereas in point of fact payment of the full sum or receipt of full consideration has not been made or taken place, but only applies to cases where the mortgagee at the time of the mortgage undertakes to pay, or to do something for, the mortgagor *after* the date of execution of the mortgage and fails to carry out his undertaking.

192 *P. L. R.* 1912, referred to.

... .. No. 67 *P. R.* 1914.

(4) *Conditional sale on non-payment of interest for two years—applicability of Regulation XVII of 1806 redemption limitation—post diem interest.*

Plaintiff sued in March 1908 for redemption of a house mortgaged to defendant on 6th October 1870 for Rs. 300. Under the terms of the deed Rs. 200 were to carry interest at Re. 1 per cent. *per mensem* and the interest on the remaining Rs. 100 was to be set off against the rent of the house, the mortgagee being in possession. It was also stipulated that if the interest was not paid for a period of two years the mortgage deed would thereafter be treated as a sale-deed and the house would become the absolute property of the defendant.

Held, that as no stipulated period for redemption was mentioned in the mortgage-deed Regulation XVII of 1806 did not apply to it, but *held* also, that the mere failure to pay interest for two years did not

MORTGAGE—*concl.*

make the mortgagee the absolute owner of the mortgaged property and deprive the mortgagor of his right to redeem within 60 years.

1 *P. R.* 1881, 50 *P. R.* 1906 and 70 *P. R.* 1907, referred to.

Held further, that defendant was entitled to the 2 years' interest mentioned in the deed and also to *post diem* interest at the stipulated rate for the 6 years prior to institution of the suit by way of damages

95 *P. R.* 1902, referred to.

... .. **No. 94 *P. R.* 1914.**

MOTHER.

(1) Not a person who would be entitled to inherit either the proprietary land of her son or his occupancy rights and therefore not entitled to pre-emption under section 12 (*b*) *thirdly*, Pre-emption Act.

See *Punjab Pre-emption Act*, 1905 (5).

... .. **No. 46 *P. R.* 1914.**

(2) Relative position of mother and step-mother under *Mitakshara*, explained.

See *Hindu Law* (5).

... .. **No. 47 *P. R.* 1914.**

MUHAMMADAN LAW.

(1) Decision must be by—in absence of proof of custom—right of brother of last holder's mother in matters of succession.

See *Custom (Succession)* (3).

... .. **No. 17 *P. R.* 1914.**

(2) Right of a Mutawalli of a mosque to claim pre-emption.

See *Punjab Pre-emption Act*, 1905 (6).

... .. **No. 59 *P. R.* 1914.**

(3) Sahgal Khatri—converts to Muhammadanism, residents of Jullundur city—whether governed by Custom in regard to alienations.

See *Custom (Alienation)* (10).

... .. **No. 74 *P. R.* 1914.**

(4) *Dower—large amount claimed as fixed dower—verbal contract—evidence—whether Court can decree customary amount, when dower was fixed.*

Held, that a verbal contract for a dower of a large sum can be admitted only if proved by most clear and satisfactory evidence.

Held also, that where both plaintiff and defendant are agreed that there was a *fixed* dower, the dispute is confined to its amount and the Court cannot go into the question as to what would be a proper dower. If the plaintiff fails to prove that the amount alleged by her was fixed, the Court can only decree the amount admitted by defendant.

Held further, that the rules of procedure and evidence laid down in the *Hidaya* to be followed in deciding disputes as to dower between husbands and wives, being at variance with the statute law on the subject, cannot be followed by Courts in India.

4 *W. R.* 110, referred to.

... .. **No. 105 *P. R.* 1914.**

MUTAWALLI.

Of a mosque—right of—to claim pre-emption.

See *Punjab Pre-emption Act*, 1905 (6).

... .. No. 59 P. R. 1914.

O

OCCUPANCY RIGHTS.

Succession to—by illegitimate son.

See *Punjab Tenancy Act* (1).

... .. No. 15 P. R. 1914.

ONUS PROBANDI.

See *Burden of Proof*.

... .. No. 58 P. R. 1914.

P

PARTNERSHIP.

(1) *Suit by one partner against his co-partners for money, without dissolution of the partnership.*

Plaintiff and defendants had entered into a partnership for the acquisition of certain standing timber and for its disposal in the shape of beams and sleepers. After part of the work had been done the partners entered into an agreement by which plaintiff in return for certain remuneration should complete the work of the partnership. Plaintiff now sues defendants for the remuneration alleged to be due to him under this agreement. It was admitted that the partnership had not yet been dissolved.

Held, that the suit was not maintainable without dissolution of the partnership and rendition of accounts.

110 P. R. 1901 and *I. L. R.* 32 *Moh.* 76, distinguished.

... .. No. 38 P. R. 1914.

(2) Hindu joint family—whether dissolved by death of a partner.

See *Hindu Law* (9).

... .. No. 101 P. R. 1914.

PENSIONS ACT.

SECTIONS 11 AND 12.

Whether applicable to alienations made prior to the enactment—construction of statutes—retrospective effect—assignment of grant of land revenue—whether a pension.

Held, that it is now a well recognised canon of the interpretation of statutes that a legislative enactment is prospective and not retrospective in its operation, except (1) when the Act only affects the procedure of the Court and (2) when it appears clearly that the intention of the Legislature was to give a retrospective effect.

Held, consequently, that section 12 of the Pensions Act is not retrospective in its operation and does not therefore affect alienations of jagirs made before the Act came into force.

I. L. R. 7 *Alh.* 886 (overruling *I. L. R.* 6 *Alh.* 630), *I. L. R.* 2 *Bom.* 291 and *I. L. R.* 19 *Bom.* 250, referred to.

Held also, that an assignment of a grant of land revenue is not prohibited by section 12, unless such grant comes within the

PENSIONS ACT—*concl'd.*

meaning of the word "pension" and is made for the consideration specified in section 11.

27 *P. R.* 1878, 57 *P. R.* 1884, 133 *P. R.* 1888, referred to.

Held further, that an assignment of land revenue may or may not be a "pension" within the meaning of sections 11 and 12, and the answer to the question must depend upon the facts of each case.

137 *P. R.* 1890, 95 *P. R.* 1906, and 96 *P. R.* 1906, referred to.

Held also, that as in this case the grant was of a fixed sum payable by the assignment of land revenue and was clearly made for political services it was a "pension" and came within the protection afforded by section 12.

... .. **No. 86 P. R. 1914.**

PERSONAL LAW.

Must be applied in absence of proof of custom.

See *Custom (Succession)* (3).

... .. **No. 17 P. R. 1914.**

PLACE OF SUING.

Objection to, not allowed in Appellate Court, where there has been no failure of justice.

See *Jurisdiction*.

... .. **No. 87 P. R. 1914.**

PLAINT.

(1) Amendment of—when admissible.

See *Civil Procedure Code*, 1908 (11).

... .. **No. 62 P. R. 1914.**

(2) Must shew ground for exemption from law of limitation.

See *Indian Limitation Act*, 1908, (1).

... .. **No. 83 P. R. 1914.**

PRE-EMPTION.

(1) *Indivisible transaction—vendees cannot shew by parol evidence that transaction is divisible—stare decisis.*

Certain land was sold to five persons for a consideration of Rs. 1,000, and the deed stated that the sale was to the first four vendees as regards four shares and to the fifth vendee as regards the remaining fifth share. In a suit for pre-emption of the whole property the transaction being treated as indivisible the vendor sought to adduce parol evidence to shew the sale was a divisible one—

Held, that persons who, by clothing their transaction in a particular form, have induced a pre-emptor to come forward and claim pre-emption in respect of the transaction as a whole, cannot be allowed to turn round thereafter and claim to shew that their real intention was something quite different.

Held also, on the principle of *stare decisis*, following:—

94 *P. R.* 1895, 66 *P. R.* 1896, 48 *P. R.* 1907 and 16 *Indian Cases* 979 and dissenting from *I. L. R.* 19 *All.* 148;—

PRE EMPTION —*continued*.

That where the purchase money for a sale is paid in a lump sum without specification of the amounts paid by the various vendees, the transaction must be regarded as indivisible, though the shares to be taken by the various vendees may have been specified in the deed.

... .. No. 6 P. R. 1914.

(2) Notice to be issued to pre-emptors under section 16, Pre-emption Act — validity of—

See *Punjab Pre-emption Act*, 1905 (7).

... .. No. 14 P. R. 1914.

(3) Superior rights of collateral, who is also a co-sharer, over mere collateral—rights of co-sharer in *shamilat* appertaining to *khotas* sold.

See *Punjab Pre-emption Act*, 1905 (3).

... .. No. 43 P. R. 1914.

(4) Right of *Mutoralli* of a mosque to claim—

See *Punjab Pre-emption Act*, 1905 (6).

... .. No. 59 P. R. 1914.

(5) Accidental omission of part of the property in plaint—amendment of.

See *Civil Procedure Code*, 1908 (11)

... .. No. 62 P. R. 1914.

(6) *Collusive suit*.

One D. S. sold the land in dispute to K. S. for Rs. 5,000. On the last day of limitation H. S. and S. S., co-proprietors in the *patti*, brought a suit for pre-emption claiming that the price was not fixed in good faith and offering to pay Rs. 2,000 or market value. On the same day and immediately after the institution of the first suit, A. S. brother of the vendor, also instituted a suit for pre-emption offering to pay the full price of Rs. 5,000. The latter's superior right of pre-emption was admitted, but the Divisional Court dismissed his suit on the ground that he was acting in collusion with the vendee and in the latter's interest.

Held, that before the suit of A. S. could be dismissed on the ground of its being collusive, it should have been shown by the strictest evidence that the object of A. S. was really to secure the land for the vendee and a desire to annoy and defeat a rival pre-emptor was not sufficient.

139 P. R. 1891, 19 P. R. 1898, 10 P. R. 1902, 67 P. R. 1907, 87 P. R. 1896, 7 P. R. 1912 and 58 P. R. 1912, referred to.

... .. No. 103 P. R. 1914.

PROVINCIAL INSOLVENCY ACT, 1907.

SECTION 30.

Indian Insolvency Act (1848) 11 and 12 Vic. c. 21, section 39—acquisition by debtor of insolvent firm of hundis drawn by the latter—claim of set off on mutual dealings.

In September 1906 the defendant-firm was indebted to the firms of S. N. P. L. and H. D. B. D. in a sum of over Rs. 4,000.

In the same month the two firms (which were in reality one, trading under separate names) became financially embarrassed and on 18th November 1906 they executed a deed by which the whole of their property was transferred to 10 persons as trustees for the creditors of the firms. Insolvency proceedings thereafter took place both at Amritsar and at Bombay and on 31st May 1907 the firms were declared insolvent by the High Court of Bombay. On 2nd January 1911 the outstandings of the insolvent firms were sold by public auction and purchased by the plaintiff, who now sued the defendant-firm for recovery of the sum due by them to the insolvent firms.

The defendant-firm alleged that they had on the 16th November 1906 purchased 3 *hundis* of the total value of Rs. 5,300 drawn by one of the insolvent firms in favour of the firm of N. C. M. M. and they now claimed to set off the amount of the *hundis* against the plaintiff's claims under section 30 of the Provincial Insolvency Act, 1907.

The Chief Court found on the facts that the transaction between the defendant-firm and the firm of N. C. M. M. was entered into with the full knowledge that the drawer of the *hundis* at that time had become hopelessly involved and that the transfer was practically a bogus one, the object being to enable the defendants to set off the money due on the *hundis* against their own debts.

Held on these facts, and following the principles laid down in *Dickson v. Evans*, 3 *Revised Reports* at p. 119, and in *In re Milton Tramways Coys.*, 25 *Ch. D.* 587, that there were no such mutual dealings between the insolvent firm and the defendants as to enable the latter to rely on the provisions of either section 39 of the Indian Insolvency Act (which had not been repealed at the time) or section 30 of the Provincial Insolvency Act.

Collins v. Jones, 34 *Revised Reports* 572, referred to.

.. .. . No 53 P. R. 1914.

PROVISIONAL LIQUIDATOR.

Power of District Court in winding-up proceedings to appoint a—

See *Indian Companies Act*, 1882 (1).

... .. No. 31 P. R. 1914.

PUNJAB ALIENATION OF LAND ACT, 1900.

SECTION 21 A (2).

Limitation of two months cannot be extended.

Held, that the period of two months within which an application should be made by a Deputy Commissioner under section 21 A (2), of the Alienation of Land Act, 1900, cannot be extended by the Court to which the application is made.

PUNJAB ALIENATION OF LAND ACT, 1900—*continued*.

Held also, that it is extremely doubtful whether section 21 A (2), Alienation of Land Act, applies to a decree passed under section 9, Specific Relief Act, where no question of title is decided.

... .. No. 7 P. R. 1914.

PUNJAB COURTS ACT, 1884.

(1) SECTION 40.

Further appeal from order of remand of Divisional Judge on a point of custom—certificate.

See *Civil Procedure Code*, 1908 (7).

... .. No. 85 P. R. 1914.

(2) SECTION 70 (1) (a).

Power of Chief Court to revise an order rejecting a plaint for non-payment of extra Court-fee—decree—appealable—Civil Procedure Code, 1908, sections 2, 96 (1), 115—Court Fees Act, VII of 1870, section 12.

Where the Court in which a suit was instituted held that it had been undervalued and directed the plaintiff to pay additional Court-fee and refusing plaintiff's prayer for four months' time proceeded to reject the plaint under order 7, rule 11 (b) of the Code of Civil Procedure—

Held, that the order is a decree within the meaning of section 2 of the Code, and is appealable notwithstanding the provisions of section 12 of the Court Fees Act and consequently no revision against the order could be entertained by the Chief Court under section 70 (1) (a) of the Punjab Courts Act.

I. L. R. 6 Cal. 249, 14 Cal. W. N. 343, I. L. R. 11 All. 91 (F. B.), 12 Cal. L. R. 148, I. L. R. 28 Cal. 334, referred to.

I. L. R. 12 All. 129 (F. B.), I. L. R. 14 Mad. 169, I. L. R. 10 Bom. 610 and I. L. R. 7 Bom. 341, distinguished.

... .. No. 80 P. R. 1914.

PUNJAB LIMITATION ACT, 1900.

Not applicable to suits for possession by reversioners after death of widow of last male holder.

See *Custom (Alienation)* (7).

... .. No. 29 P. R. 1914.

PUNJAB MUNICIPAL ACT, 1891.

SECTION 38.

Notice of suit.

Held, that section 38 of the Municipal Act does not apply to a suit for a declaration that plaintiff is the owner of a certain plot of land, and that the defendant (Municipal Committee) who refused plaintiff permission to build on it, alleging that it was their property, had no right to it.

I. L. R. 22 Bom. 230, I. L. R. 22 Bom. 283, I. L. R. 22 Bom. 289 (F. B.), I. L. R. 22 Bom. 636 and I. L. R. 25 Bom. 142, approved.

... .. No. 32 P. R. 1914

PUNJAB PRE-EMPTION ACT, 1905.

(1) SECTION 11, *proviso*.

Effect on rights of pre-emptor where vendee acquires a new status after date of sale.

On the 23rd October 1906 agricultural land was sold by an Arora proprietor to a Kureshi and on the 12th April 1907 the Kureshis were declared members of an agricultural tribe. In October 1907 plaintiff, an Arora of same tribe as vendee and a co-sharer in the *khata* comprising the land sold (Pre-emption Act, section 11, *proviso*), brought the present suit for pre-emption. It was contended that inasmuch as the vendee became a member of an agricultural tribe before the date of suit he acquired a right of pre-emption at least equal to that of the plaintiff, whose suit must consequently fail.

Held, following the ruling of the majority of the Full Bench in 90 P. R. 1909 (F. B.), that the plaintiff must succeed by reason of the superiority of his position at the date of sale and his retention of the *status* on which his suit was based.

53 P. R. 1911, distinguished.

... ..

No. 26 P. R. 1914.

(2) SECTION 11, *proviso*.

Whether a turkhan and a Lohar are members of same tribe.

Held, having regard to the principle laid down in 112 P. R. 1908, (p. 515), viz., that the word "tribe" as used in section 11 *proviso* of the Punjab Pre-emption Act should be construed broadly and that each case should be decided on its merits, it had not been shown that the concurrent findings of the lower Courts that the *turkhan* claimant belonged to the same tribe as the vendors who are *Lohars* of the same village, were incorrect.

... ..

No. 49 P. R. 1914.

(3) SECTION 12.

Preference to pre-emptor, a collateral of vendor who is also a co-sharer, over a collateral in same degree—whether it applies to the shamilat appertaining to the khata sold in which the vendee is also a co-sharer.

Held, that a collateral who is also a co-sharer in the land sold has a preferential right of pre-emption to a vendee-collateral, equally related to the vendor.

Held further, that this preferential right extends also to the *shamilat* appertaining or accessory to the land sold, although the vendee is a co-sharer in the general *shamilat-deh*.

... ..

No. 43 P. R. 1914.

(4) SECTION 12 (c) SECONDLY.

Whether a thulla is a sub-division, within meaning of the clause.

Where it was found, as in this case, that the village was divided into two *pattis*, called *patti Jatan* and *patti Gujaran*, and that *patti Jatan* was further divided into two *thullas*, and each *thulla* had a separate *shamilat thulla*, in which the proprietors of the other *thulla* had no share, and each *thulla* was entered in and authenticated by the Settlement Record—

Held, following the principle laid down in 169 P. R. 1889, that the *thullas* were sub-divisions of the village within the meaning of section

PUNJAB PRE-EMPTION ACT, 1905—*contd.*

12 (c) *secondly* of the Punjab Pre-emption Act, 1905, notwithstanding that the sub-division of *patti* Jatan into two *thullus* was made on the *khet* but and not on the *chak* but principle.

69 *P. R.* 1893, 76 *P. R.* 1894, 45 *P. R.* 1897 and 142 *P. L. R.* 1905, referred to.

... .. No. 60 *P. R.* 1914.

(5) SECTION 12 (b) *thirdly*.

Not applicable to a mother in regard to either a proprietary or an occupancy holding—Punjab Tenancy Act, XVI of 1887, section 59.

Held, that as a mother under customary law is not a person who would be entitled to inherit the proprietary land of her son on the latter's decease, and as under section 59 of the Punjab Tenancy Act, she has no right whatever to succeed to his occupancy rights, section 12 (b) *thirdly* of the Punjab Pre-emption Act does not confer a right of pre-emption upon her in regard to either a proprietary or an occupancy holding, sold by her son.

Held also, that the mother's right under Customary Law to temporary possession of her deceased son's landed property is similar to that of a widow and is a mere development of her original right to maintenance.

34 *P. R.* 1893, referred to.

... .. No. 46 *P. R.* 1914.

(6) SECTION 13 (1) *secondly*.

Urban immovable property—status of Mutawalli of a mosque and Manager of a dharamsala to claim pre-emption—Muhammadan law.

Held, that the Mutawalli of a Muhammadan mosque has a right of pre-emption, and can exercise that right, under section 13 (1) *secondly* of the Punjab Pre-emption Act, 11 of 1905, in respect of urban immovable property which is adjacent to the mosque, and that for the purposes of the Pre-emption Act, no distinction can be made between the rights of the Mutawalli of a mosque and those of the Manager of a *dharamsala*.

153 *P. R.* 1884, 100 *P. R.* 1885, and *L. L. R.* 26 *All.* 212, referred to.

Civil Appeal No. 1525 of 1882 (unpublished), disapproved.

... .. No. 59 *P. R.* 1914.

(7) SECTION 16.

Nature of application for issue of a notice—validity of notice, not signed by the applicant or the presiding officer of the Court.

Held, that it is not essential before a notice is issued under section 16 of the Punjab Pre-emption Act that there should have been negotiations with any particular individual for the sale of the property and no limit is provided either as regards the time within which negotiations are to be completed after the issue of notice or as regards the number of persons who can be approached with a view to negotiating the sale.

Held further, that a notice, issued under section 16 of the Punjab Pre-emption Act which is signed by the official authorised

PUNJAB PRE-EMPTION ACT, 1905—*concl'd.*

to sign and issue processes under the orders of the Court and bears the seal of the Court is not bad because it is not signed by the person at whose instance it is issued or by the presiding officer of the Court.

... .. No. 14 P. R. 1914.

PUNJAB TENANCY ACT, 1887.

(1) SECTION 59.

Succession to occupancy tenancy by illegitimate son.

Held, that an illegitimate son of a Chambar Rajput of the Hoshiarpur District is not entitled to succeed to his father's occupancy rights under section 59 of the Punjab Tenancy Act, as he is not a male lineal descendant of his father within the meaning of that section.

65 P. R. 1911 and I. L. R. 30 All. 508, referred to.

... .. No. 15 P. R. 1914.

(2) SECTION 59.

A mother has no right of succession to an occupancy holding.

See *Punjab Pre-emption Act*, 1905 (5).

... .. No. 46 P. R. 1914.

(3) SECTIONS 59 AND 112.

Succession to occupancy holding—entry in Wajib-ul-arz of Settlement Record, 1869-1873.

The question being whether succession in this case could be governed by an agreement between landlords and occupancy tenants incorporated in the village *Wajib-ul-arz* as framed in a revision of the record of rights of the Una *tahsil* extending over the years 1869-1873.

Held, that for the purposes of section 112 of the Tenancy Act the Court can only consider the *Wajib-ul-arz* of the revised record.

Held further, that as the *Wajib-ul-arz* was a part of the record taken up in 1872 and not finally attested by the Settlement Tahsildar till the 25th March 1873 the entry relied on did not fulfill the condition of section 112 in regard to time.

The conflict between the rulings in 97 P. R. 1909, 38 P. R. 1910 and Civil Revision 400 of 1908 (unpublished) and the rulings 47 P. R. 1877, 64 P. R. 1877, 22 P. R. 1882, 196 P. R. 1889, 20 P. R. 1896 and 130 P. R. 1907, pointed out.

... .. No. 22 P. R. 1914.

(4) SECTION 77 (3) (i)

Suit by occupancy tenant against landlord for possession of land for purpose of using it as a threshing floor.

See *Jurisdiction (Civil or Revenue Court)*.

... .. No. 444 P. R. 1914.

PUNJAB TENANCY ACT, 1887—*concluded*.

(5) SECTION 100 (2).

Registration of decree of a Revenue Court as one of a Civil Court—prejudice to parties.

The plaintiff sued in the Revenue Court to recover Rs. 160 as damages for 2 years under an agreement, by which the defendants undertook to give up cultivation of certain land to plaintiffs or in default to pay Rs. 80 a year. The Assistant Collector dismissed the suit holding that the matter was one for a Civil Court to decide.

The Collector on appeal decreed the claim. The Commissioner, holding that the Revenue Courts had no jurisdiction, referred the case to the Chief Court to have the decree of the Collector registered as that of a Civil Court.

Held, that the suit, if heard by the Civil Courts, would be a Small Cause under Rs. 500 in value and no second appeal would be competent, so that the effect of registering the decree of the Collector would be to prejudice the defendants by depriving them of all further remedy and the Chief Court could not, therefore, intervene under section 100 (2) of the Tenancy Act.

... .. No. 56 P. R. 1914.

R

REGISTERED SALE DEED.

Burden of proof of consideration laid on vendee where he has slept over his rights for a long time.

See Burden of Proof.

... .. No. 58 P. R. 1914

REGULATION XVII OF 1806.

(1) Flaws in proceedings for foreclosure under—

See mortgage (2)

... .. No. 57 P. R. 1914.

(2) Not applicable to mortgages where no stipulated period for redemption is mentioned in the deed.

See Mortgage (4).

... .. No. 94 P. R. 1914.

RES JUDICATA.

(1) *Civil Procedure Code, Act XIV of 1882, section 13—first suit for possession by redemption—second suit for possession.*

The land in suit was first mortgaged for Rs. 180. Subsequently in 1889 it was mortgaged again to three persons, *viz.*, N., K. and H. (N. having four shares while the remaining two had two and one share, respectively). These three mortgagees instituted a suit for possession by redemption against the previous mortgagee and the representatives of the mortgagors. This suit was finally decreed in 1893, by which plaintiffs were to obtain possession on payment of Rs. 403 to the previous mortgagee. This decree was never executed.

RES JUDICATA—conclld.

The present plaintiffs, the sons of N., now brought another suit for possession of their $\frac{1}{4}$ th share against the same parties alleging that they paid off the previous mortgagee out of Court within twelve years of suit. It was proved that the mortgagors had all along remained in possession of the mortgaged land—

Held, that the previous suit, *qua* the mortgagors, was one for possession similar to the one now brought and, as both suits were based upon the same cause of action, the present suit was barred by the rule of *res judicata* under section 13 of the old Code of Civil Procedure.

... .. **No. 12 P. R. 1914.**

(2) Where plea of *khana-damadi* had not been pressed in previous suit between the parties.

See *Custom (Alienation)* (7).

... .. **No. 29 P. R. 1914.**

(3) Suit by mortgagee to redeem from sub-mortgagee who has purchased equity of redemption—subsequent suit by latter to redeem the mortgage.

See *Civil Procedure Code*, 1908 (2).

... .. **No. 102 P. R. 1914.**

RESTITUTION.

See *Civil Procedure Code*, 1908 (9).

... .. **No. 10 P. R. 1914.**

REVISION (CIVIL).

(1) *Conduct of petitioner shewing acquiescence in the order objected to—refusal of Chief Court to exercise its revisional jurisdiction—conflict of rulings as to admissibility of remedy on revision where petitioner has availing remedy by way of appeal from the final decree.*

An *ex-parte* decree was passed against the defendant-respondents in the case and they applied to have it set aside. The District Judge passed an order on 6th December, setting aside the *ex-parte* decree conditional on the respondents paying to the plaintiff-petitioner Rs. 25 by way of cost. The costs were paid on the 7th December and received by petitioner without protest. On the 8th plaintiff-petitioner put in his replication to the respondent's pleas. On 10th December the case was made over to the Sub-Judge for trial and on the 14th that Court appointed a commissioner to go through the accounts of the parties and report thereon; on the 6th February 1911 the petitioner filed the present petition for revision.

Held, that the petitioner's conduct after the order of the 6th December shewed that he did not consider himself materially prejudiced by the order and taking into consideration the delay in filing this petition the Chief Court was justified in declining to exercise its revisional jurisdiction in favour of the petitioner.

The conflict in the rulings 125 *P. R.* 1892 and *I. L. R.* 34 *Al.* 592 on the one hand and *I. L. R.* 22 *Cal.* 981, 9 *Cal. W. N.* 584 and *I. L. R.* 25 *Al.* 280 on the other, pointed out.

... .. **No. 25 P. R. 1914.**

REVISION (CIVIL)—*continued*.

(2) Immaterial irregularities in proceedings, not sufficient ground for revising decree passed on an award of arbitrators.

See *Civil Procedure Code*, 1908 (19).

... .. No. 28 P. R. 1914.

(3) An order rejecting a plaint for non-payment of extra Court fee is open to appeal and consequently no revision can be entertained.

See *Punjab Courts Act*, 1884 (2).

... .. No. 80 P. R. 1914.

RTWAJ-LAM.

(1) Hoshiarpur district—succession by adopted son in his natural family—Bains Jats—*Tahsil* Garhshankar.

Value of entry in—wherecustom of one part of a district is differentiated from the rest.

See *Custom (Succession)* (10).

... .. No. 55 P. R. 1914.

(2) Jhelum district—Awans—power of alienation of proprietors having sons living.

See *Custom (Alienation)* (9).

... .. No. 72 P. R. 1914.

(3) Jullundur *tahsil*—succession to heirless estates—proprietors of *patti*.

See *Custom (Succession)* (1).

... .. No. 3 P. R. 1914.

(4) Kulu—widow of Bairagi—succession by

See *Custom (Succession)* (6).

... .. No. 36 P. R. 1914.

(5) Ludhiana district, *Tahsil* Jagraon—Jats—collateral succession by adopted son in family of his adoptive father.

See *Custom (Succession)* (7).

... .. No. 40 P. R. 1914.

(6) Muzaffargarh district—Gurmiani Biloches—Sister's preferential right of succession to collateral, in 5th degree—entry throws *owns probandi* on the collaterals.

See *Custom (Succession)* (12).

... .. No. 104 P. R. 1914.

(7) Rawalpindi district—power of alienation by sonless Awan proprietor.

See *Custom (Alienation)* (2).

... .. No. 5 P. R. 1914.

(8) Sialkot district—adoption of daughter's son—Awans.

See *Custom (Adoption)* (1).

... .. No. 9 P. R. 1914.

S

SALE.

To various vendees—whose share in the payment of the purchase-money is not specified though their respective shares in the property are given, not a divisible transaction.

See *Pre-emption* (1).

... .. No. 6 P. R. 1914.

SON-IN-LAW.

Land gifted to, descends to female as well as male heirs-

See *Custom (Succession)* (2).

... .. No. 13 P. R. 1914.

SUITS VALUATION ACT, 1887.

(1) SECTIONS 3, 4 AND RULE VI.

Valuation of suit for declaration by occupancy tenants against their landlords that the latter are not entitled to recover from them more than $\frac{1}{16}$ th share of produce.

Held, that a suit for a declaration brought by plaintiffs, as occupancy tenants against defendants, as their landlords, to the effect that the latter are not entitled to recover from them by way of rent more than $\frac{1}{16}$ th share of produce, known as *lichh*, is covered by section 4 of the Suits Valuation Act, read with the rules framed under section 3 and that the value of the suit for purposes of jurisdiction is accordingly 15 times the land revenue.

... .. No. 54 P. R. 1914.

(2) SECTION 8.

Valuation of suit asking Court to administer the estate of a deceased person and paying plaintiff her share is the same for purposes of Court-fee and for purposes of jurisdiction.

See *Indian Court-fees Act* (1).

... .. No. 100 P. R. 1914.

T

TRANSFER OF PROPERTY ACT, 1882.

(1) SECTIONS 3, 6 (c), 130.

Claim for damages for breach of contract is a mere right to sue and therefore not transferable.

See *Assignment*.

... .. No. 106 P. R. 1914.

(2) SECTION 111 (g).

Whether lease has determined by reason of lessee sub-letting the premises.

Held, that having regard to section 111 (g) of the Transfer of Property Act, a lease does not determine on breach of the condition

TRANSFER OF PROPERTY ACT, 1882—*concl'd.*

not to sub-let, in the absence of an express condition for re-entry by the lessor or for the lease becoming void on a breach of the condition not to sub-let.

11 P. R. 1898, I. L. R. 26 *Mad.* 157 and I. L. R. 28 *Al.* 100,
referred to. No. 33 P. R. 1914.

T

THULLA.

Whether a sub-division—for purposes of pre-emption.

See *Punjab Pre-emption Act*, 1905 (4).

... .. No. 60 P. R. 1914.

V

VALUATION OF SUIT.

(1) By occupancy tenants for declaration that landlord is not entitled to recover from them by way of rent more than $\frac{1}{6}$ th share of produce (*lichh*)—15 times *jama*.

See *Suits Valuation Act*, 1887 (1).

... .. No. 54 P. R. 1914.

(2) Suit asking Court to administer the estate of a deceased person and paying plaintiff her share—Court-fee *ad valorem*.

See *Indian Court-fees Act* (1).

... .. No. 100 P. R. 1914.

VILLAGE COMMON LAND.

Grazing rights—claim by residents who are neither proprietors nor tenants—Wajib-ul-arz.

The plaintiffs, some of the residents of *Manza* Mazra in the Hoshiarpur district, mostly shopkeepers by profession and neither proprietors nor tenants of land in the village, sued the proprietary body for a declaration that 1,190 *kanals* of *banjar* shall be kept as grazing land and that plaintiffs shall be entitled to graze their cattle in it, as of old, free of all charge. They relied upon an entry in the *Wajib-ul-arz* which lays down that the cattle of every proprietor and non-proprietor shall graze as of old in the *shamilat banjar* without charge.

Held, that as the heading of the clause in the *Wajib-ul-arz* shewed that plaintiffs were not parties to the agreement embodied therein, they had no claim under it, nor did previous user establish any right in their favour.

... .. No. 95 P. R. 1914

W

WAJIB-UL-ARZ.

(1) *Manza* Girate, *Tahsil* Khuhab, District Shahpur, as to *Ala malik*' rights to land of *malik qabza* on submersion.

See *Custom (Alluvion and Diluvion)*.

... .. No. 18 P. R. 1914

WAJIB-UL-ARZ—concl'd.

(2) Entry in—how far it can be relied on for purpose of section 112, Tenancy Act.

See *Punjab Tenancy Act* (3).
 No. 22 P. R. 1914.

(3) As to grazing rights, not applicable to non-proprietors who were not parties to the agreement embodied therein.

See *Village Common Lands*.
 No. 95 P. R. 1914.

WIDOW.

Power of—by Hindu Law—to sell her husband's estate with consent of nearest reversioner.

See *Hindu Law* (7).
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(2) Of wife to husband only—when not admissible—confession by woman, while in Police custody, retracted 5 days later before same Magistrate, of little value.

See *Indian Evidence Act*, (4).

... .. No. 10 P. R. (Cr.) 1914.

(3) *Retracted—value of—in respect of person making it and in respect of co-accused.*

Held, that the net result of the authorities on the value of retracted confessions is—

(i) That it is not illegal to base a conviction upon the uncorroborated confession of an accused person, provided the Court is satisfied that the confession was voluntary and is true in fact ;

(ii) That, from the point of view of legality pure and simple, the fact that a confession has been retracted, is immaterial ;

(iii) That the use to be made by the Court of a confession, whether retracted or not, is a matter rather of prudence than of law, the business of the Court being to make up its mind, in accordance with the dictate of common sense, whether it is safe to believe the confession or not ;

(iv) That experience and common sense shew that, in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless, from the peculiar circumstances in which it was made, and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine ;

(v) That, when it is a question of using a confession against a co-accused of the person confessing and the Court would not be prepared to accept the confession *per se* as sufficient, the corroboration ought to be of the kind that not only confirms the general story

CONFESSION—*conclld.*

of the crime but also unmistakably connects the said co-accused with the crime.

16 *P. R. (Cr.)* 1903, 24 *P. R. (Cr.)* 1910, 5 *P. R. (Cr.)* 1911, *I. L. R.* 29 *All.* 434, 153 *P. L. R.* 1910, 31 *P. R. (Cr.)* 1869, *I. L. R.* 27 *Cal.* 295, and 3 *P. W. R.* 1907, and remarks under section 24, Indian Evidence Act, in Amir Ali's Law of Evidence, 5th Ed., p. 255, referred to.

Held, applying these principles to the present case that the retracted confession by accused 2 corroborated by his production of the axe and its handle should be accepted as against himself but not as against accused 1.

... .. **No. 30 P. R. (Cr.) 1914**

CRIMINAL PROCEDURE CODE, 1898.**(1) SECTIONS 94 AND 96.**

Summons to produce, and search warrant—whether enforceable against accused persons and in respect of what documents or things—Court's power to employ others to assist it in reading and understanding contents of documents.

Held, that the provisions of sections 94 and 96 of the Code of Criminal Procedure may be used against any person, including the person accused in the case.

Held also, that when the premises to be searched are those of the accused person it is not necessary that the warrant should be restricted to finding of the document, etc., in respect of which the alleged offence has been committed. The words "document or thing," in section 96 cover *any* document or thing, the production and inspection of which is "necessary or desirable" or will serve the ends of justice.

Held further, that a Criminal Court has power to invoke the aid of persons capable of helping it to read and understand the contents of books, etc., found.

I. L. R. 15 *Cal.* 109, *I. L. R.* 38 *Cal.* 304, *I. L. R.* 41 *Cal.* 261, *I. L. R.* 37 *Mad.* 112, and 5 *Bom. L. R.* 980, referred to.

12 *Cal. W. N.* 1016, and 9 *Indian Cases* 564, differed from.

... .. **No. 36 P. R. (Cr.) 1914.**

(2) SECTIONS 110, 122, 123.

Security for good behaviour—grounds for refusing sureties offered—reference to Sessions Court.

The petitioner was ordered by a Magistrate of the 1st class to give a bond, under section 110, Criminal Procedure Code, to be of good behaviour for three years, for Rs. 1,000 with four respectable witnesses. Petitioner offered as sureties four persons, who were admittedly financially fit to be sureties for Rs. 1,000, but these were rejected by the Magistrate, two as being relations, one as being a boy, and the last as being a bad character,

CRIMINAL PROCEDURE CODE, 1898—*contd.*

Held, that the order for security should have given particulars as to whether each and all of the sureties was to be held liable for Rs. 1,000 on occasion arising or Rs. 1,000 between them, so as to prevent misunderstanding later.

Held also, that mere relationship is no reason for refusing a surety, on the contrary it is ordinarily a recommendation.

I. L. R. 25 *All.* 131, approved.

Held also, that the Magistrate should have himself made inquiries before rejecting a surety as unfit, and should not have delegated such inquiry to any one else.

18 *P. R. (Cr.)* 1906, referred to.

Held also, that the object of the law as to security for good behaviour is not to fill the jails with bad characters, but to bring reasonable pressure to bear on such persons to respect the law, and that two sureties would have been sufficient in the present case.

28 *P. R. (Cr.)* 1901, referred to.

Held further, that as the order for security specified a term exceeding one year the Magistrate in ordering detention should have referred the case to the Sessions Court under section 123 (2), Criminal Procedure Code, even though he ordered imprisonment for one year only.

Held also, that the District Magistrate, when the case came before him, was not justified in dismissing the petition of the aggrieved party, that petition being explicit enough, merely because it did not contain exactly the details he wished to ascertain.

... .. **No. 6 P. R. (Cr.) 1914.**

(3) SECTIONS 110 AND 526.

Transfer of proceedings under section 110 of the Code.

Held that section 526 of the Criminal Procedure Code does not empower a High Court to pass an order for transfer of proceedings under section 110 of the Code.

I. L. R. 15 *All.* 365, 4 *P. R. (Cr.)* 1896, 42 *P. R. (Cr.)* 1905, 6 *P. R. (Cr.)* 1911 (*F. B.*), *I. L. R.* 25 *Bom.* 179, *I. L. R.* 28 *Cal.* 709, 13 *P. R. (Cr.)* 1885, *I. L. R.* 16 *Cal.* 781 (787), approved.

I. L. R. 26 *Mad.* 188, 2 *Cal. L. J. R.* 614, and *I. L. R.* 34 *All.* 533, dissented from : 1 *P. R. (Cr.)* 1913, distinguished.

... .. **No. 5 P. R. (Cr.) 1914.**

(4) SECTION 110, (d).

Obtaining decree by means of forged documents.

The two petitioners were bound down in security to be of good behaviour by the order of the District Magistrate. The evidence

CRIMINAL PROCEDURE CODE, 1898—*contd.*

against them was that they manufactured forged bonds and obtained decrees by false and forged evidence.

Held that the obtaining of decrees by means of forged documents is neither cheating nor extortion as defined in the Penal Code and the order under section 110 of the Code of Criminal Procedure must therefore be set aside.

25 *P. R. (Cr.)* 1884, and 28 *P. R. (Cr.)* 1900, referred to.

Held also, that the two petitioners could not be tried together unless their association in the same offences was made out.

... .. **No. 21 P. R. (Cr.) 1914.**

(5) SECTION 177.

Offences committed in foreign territory—Bhatinda Railway station—triable by which Court.

See *Foreign Jurisdiction*.

... .. **No. 7 P. R. (Cr.) 1914.**

(6) SECTION 195.

Sanction for prosecution in respect of offences committed before an arbitrator.

Held, that sanction under section 195, Code of Criminal Procedure, is required, before a Court can take cognisance of a complaint in respect of offences under sections 193 and 471, Indian Penal Code, alleged to have been committed in the proceedings before an arbitrator appointed in a civil suit.

(1907) 17 *Mad. L. J.* 420 and (1907) 6 *Cr. L. J.* 160, referred to

... .. **No. 3 P. R. (Cr.) 1914.**

(7) SECTIONS 227, 254, 255, 367 (1) AND 403 (1).

Whether Court has power to alter the charge after case has been compounded.

Held, that where a Court has drawn up a charge of an offence compoundable without sanction of Court and this charge, having been read and explained to the accused, has been pleaded to, that Court should, upon the presentation to it of a petition of composition by the person mentioned in the last column in the table in section 345, Criminal Procedure Code, at once accept the position and acquit the accused and has no power to alter the charge already drawn up.

3 *Cal. W. N.* 322, 3 *Cal. W. N.* 548, and 1 *L. R.* 29 *Cal.* 726 (*F. B.*), referred to.

4. *Bom. L. R.* 718 and 11 *P. R. (Cr.)* 1907, distinguished.

... .. **No. 29 P. R. (Cr.) 1914 (F. B.)**

CRIMINAL PROCEDURE CODE, 1898—*contd.*

(8) SECTION 239.

Joint trial of persons having possession of cocaine in different rooms in the same building.

See *Excise Act*, 1896 (2)

... .. No. 20 P. R. (Cr.) 1914.

(9) SECTION 239.

Joint trial of persons accused of offences under sections 3 and 4, respectively, of the Gambling Act, III of 1867.

Held, that the joint trial of 19 persons convicted under the Gambling Act, one under section 3 for keeping a gambling den, and the rest under section 4 for frequenting it and gambling there—is not covered by section 239 of the Code of Criminal Procedure and is illegal and must be set aside.

5 P. W. R. 1910 and I. L. R. 25 Mad. 61 (P. C.), referred to.

... .. No. 35 P. R. (Cr.) 1914.

(10) SECTION 256.

Right of accused to have the witnesses for the prosecution cross-examined after charge is framed.

Held, that the provisions of section 256 of the Criminal Procedure Code are imperative and an accused, after a charge has been framed against him, should be required to state whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken, and the omission to follow section 256 usually involves remand and retrial of the case from the point of the drawing of the charge.

I. L. R. 20 Cal. 469, 22 Cal. W. N. 5, and I. L. R. 27 Cal. 370, referred to.

... .. No. 11 P. R. (Cr.) 1914.

(11) SECTION 488.

Order against father of husband for his wife's maintenance—wife's application for maintenance because husband married another wife.

Held, that an order making the father of the husband jointly liable for his son's wife's maintenance is not contemplated by section 488 of the Code of Criminal Procedure.

26 P. R. (Cr.) 1903, referred to.

Held also, that a wife is not entitled to an order for maintenance merely because her husband has married another wife and she declines to live with him on that account.

66 P. R. (Cr.) 1887, referred to.

... .. No. 12 P. R. (Cr.) 1914.

CRIMINAL PROCEDURE CODE, 1898—*contd.*

(12) SECTION 514.

Forfeiture of security bond.

The petitioner stood surety in the sum of Rs. 500 for the appearance in Court, *up to the conclusion of the case*, of a man who had been called upon under section 110, Criminal Procedure Code, to furnish security for good behaviour. The case was found proved against the man and he was directed to produce sureties for good behaviour, but he failed to appear; proceedings were thereupon taken against the petitioner for the forfeiture of his bond and the lower Courts ordered forfeiture to the extent of Rs. 200.

Held, that the order of the lower Court was correct as the case was not complete, nor were the Magistrate's duties in connection therewith at an end, until the culprit had appeared with his sureties and executed his bond.

... .. **No. 32 P. R. (Cr.) 1914.**

(13) SECTION 514 AND SCHEDULE V, FORM 10.

Forfeiture of bond to keep the peace—attempt to poison a person.

Held, that a bond to keep the peace cannot be forfeited under section 514 of the Code of Criminal Procedure except on proof of the commission of an offence involving a probable breach of the peace (*vide* form 10, schedule V) and consequently a conviction for theft, wrongful confinement, extortion, abduction of a woman or a secret attempt to poison a person (as in this case), not being offences which would "probably" result in a breach of the peace, is not sufficient cause for forfeiture.

18 W. R. (Cr.) 63, 19 W. R. (Cr.) 48 and 7 P. R. (Cr.) 1906, referred to.

... .. **No. 22 P. R. (Cr.) 1914.**

(14) SECTION 522.

Legality of order for possession made as a separate proceeding from the conviction and considerable time afterwards.

On 18th January 1912 complainant applied for possession under section 522 of the Code of Criminal Procedure. He had successfully prosecuted the accused persons under section 447 of the Penal Code for forcible seizure of his land, and accused on 20th November 1911 had been convicted and fined and a petition for revision had been rejected.

The application for possession was, on 24th September 1912, consigned to the record-room, because it was held undesirable to proceed with it while a civil proceeding concerning the same land between the parties was going on in the Chief Court. When that civil proceeding was disposed of in favour of complainant, he renewed his application by a petition, dated 19th June 1913.

CRIMINAL PROCEDURE CODE, 1898—*concl'd.*

Held, that the Magistrate was under section 522 of the Code of Criminal Procedure justified in accepting the application.

I. L. R. 23 *Bom.* 494 and 14 *Cr. L. J.* 172, approved.

4 *Cal. W. N.* 308, disapproved.

I. L. R. 25 *Cal.* 431, *I. L. R.* 27 *Cal.* 174 and *I. L. R.* 25 *All.* 341, distinguished.

... .. **No. 15 P. R. (Cr.) 1914.**

E

EVIDENCE.

(1) In criminal cases prosecution must exclude all explanation of the facts reasonably consistent with accused's innocence.

See *Indian Penal Code* (5).

... .. **No. 1 P. R. (Cr.) 1914.**

(2) Of confession of an accused person, while in custody of a jailor, admissible, notwithstanding presence of a Police Officer.

See *Indian Evidence Act*, 1872 (2).

... .. **No. 8 P. R. (Cr.) 1914.**

EXCISE ACT, 1896.

(1) SECTIONS 44 AND 57.

Whether Police officer notified under section 44 is an Excise officer for purpose of section 57.

Held, that under notifications of the Local Government, made under section 44 of the Excise Act, 1896, a Sub-Inspector of Police is an excise officer for all purposes connected with the excise powers conferred on excise officers by sections 36, 37 and 38, and that consequently such an officer must be deemed to be also an excise officer for the purpose of section 57 of the Act.

22 *P. R. (Cr.)* 1900, 8 *P. R. (Cr.)* 1901, *I. L. R.* 20 *All.* 70 and *I. L. R.* 30 *All.* 377, followed.

13 *P. R. (Cr.)* 1910, and 9 *P. R. (Cr.)* 1897, distinguished.

... .. **No. 2 P. R. (Cr.) 1914.**

(2) SECTIONS 48 AND 53.

Cocaine in possession of accused's mistress—Penal Code, section 27—joint trial of persons separately in possession of cocaine—Criminal Procedure Code, 1898, section 239.

One S. L. occupying one room in a certain house was found in possession of cocaine and cocaine was also found in another room of the same house occupied by one Mussammât P. The accused B. L. whose mistress Mussammât P. was and who was the lessee of her room, was tried jointly with S. L. and some other persons for offences under sections 48 and 53 of Act XII of 1896.

Held, that as there was no connecting link between the possession of cocaine by S. L. and that of Mussammât P., B. L. who

EXCISE ACT, 1896—*concl'd.*

was only concerned with the latter offence could not be tried jointly with S. L. and his conviction under section 48 of the Excise Act would consequently have to be set aside.

I. L. R. 25 Mad. 61 (P. C.), referred to.

Held further, that in the absence of any proof that the possession of cocaine by Mussammat P. was on account of her protector B. L. the latter could not be held guilty of an offence under section 48 of the Act, although a permanent mistress might be regarded as a "wife" for the purposes of section 27 of the Penal Code.

... .. **No. 20 P. R. (Cr.) 1914.**

(3) SECTION 49.

Sale by medical practitioner of medicine containing some brandy.

Held, that a medical practitioner who put a little brandy into one of the medicines prescribed and sold it to a patient, has not committed the offence of illicitly selling spirit within the meaning of section 49 of the Excise Act.

... .. **No. 33 P. R. (Cr.) 1914.**

EXCISE OFFICER.

Who is—for purpose of section 57, Excise Act.

See *Excise Act, 1896 (1)*.

... .. **No. 2 P. R. (Cr.) 1914.**

F

FOREIGN JURISDICTION.

Offence committed at Bhatinda Railway station, in the Native State of Patiala—tribable by which Court—India (Foreign Jurisdiction) order in Council 1902 and Notifications Nos. 515 I. B. and 516 I. B. of 17th March 1913—Criminal Procedure Code, Act V of 1898, section 177.

Held, that under Government of India Notification No. 515 I. B. of 17th March 1913, the Courts of the Hissar district and those of Ferozepore have concurrent jurisdiction in the matter of offences committed at the Bhatinda Railway station.

Held also, that in future such jurisdiction should only be exercised by the Ferozepore Courts and not the Hissar Courts.

Held further, that under the combined effect of the two Notifications Nos. 515 and 516 I. B. the appeal in the present case against the order of the Magistrate of Ferozepore lay to the Political Agent for the Phulkian States and Bahawalpur.

... .. **No. 7 P. R. (Cr.) 1914.**

FORFEITURE.

(1) Of bond to keep the peace can only be ordered on proof of the commission of an offence involving a *probable* breach of the peace.

See *Criminal Procedure Code, 1898 (13)*.

... .. **No. 22 P. R. (Cr.) 1914.**

FORFEITURE—*concl'd.*

(2) Of security for appearance of a person *up to conclusion of the case* in proceedings under section 110, Criminal Procedure Code.

See *Criminal Procedure Code*, 1898 (12).

... .. **No. 32 P. R. (Cr.) 1914.**

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See *Indian Penal Code* (1).

... .. **No. 25 P. R. (Cr.) 1914.**

G

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See *Criminal Procedure Code*, 1898 (9).

... .. **No. 35 P. R. (Cr.) 1914**

GENERAL CLAUSES ACT, 1897.

SECTION 3 (21) (29).

"Government" includes "Local Government."

See *Indian Press Act*, 1910 (2).

... .. **No. 27 P. R. (Cr.) 1914 (F. B.)**

I

INDIAN COMPANIES ACT, 1882.

(1) SECTION 74.

Offence of not filing Balance sheet—persons who have ceased to be directors before the expiry of the 12 months allowed.

Held, that persons who had ceased to be directors of a Company before the expiration of 12 months after the Company had been registered, cannot under section 74 of the Companies Act of 1882, be convicted of an offence in connection with the non-filing of a balance sheet, which the Company was not by law obliged to file till the year was complete.

... .. **No. 17 P. R. (Cr.) 1914.**

(2) SECTION 74.

Fixed penalty for not filing Balance sheet—Court has no discretion—revision by Chief Court—discretionary.

Held, that under section 74 of the Companies Act, 1882, the penalty for not filing a Balance sheet is fixed and the Court has no discretionary power to inflict a lesser fine.

Held also, that the Chief Court in exercise of its extraordinary revisional jurisdiction has a discretionary power to interfere, or refuse to interfere, with an illegal order inflicting a lesser fine and that the present case was one in which the Court should interfere and enhance the fine to the amount fixed by law.

19 P. W. R. (Cr.) 1910, and 29 P. W. C. (Cr.) 1913, referred to.

... .. **o. 19 P. R. (Cr.) 1914.**

INDIAN EVIDENCE ACT, 1872.

(1) SECTIONS 6 AND 122.

Evidence of what was said by a by-stander some time after commission of crime—evidence of wife of what her husband told her—relevancy of.

In the trial of certain persons for murder several witnesses were produced who testified to the fact that one S. had told them the morning following the night on which the murder was committed that he had seen the accused commit the murder. S. himself was also produced but denied all knowledge of the occurrence. The lower Court also admitted the evidence of one Mussammât J., the wife of one of the accused, disclosing communications made to her by her husband.

Held, that any evidence as to what S. said in the morning was inadmissible as hearsay and could not be admitted as a relevant fact under section 6 of the Evidence Act, as the words were not said *during* the transaction, but *subsequent* to its completion.

11 Cal. W. N. 266, and Ameer Ali and Woodroffe's Law of Evidence (note under section 6), referred to.

Held also, that the evidence of Mussammât J., the wife of one of the accused, as to certain communications between her and her husband was inadmissible under section 122 of the Evidence Act.

27 P. R. (Cr.) 1913, referred to.

... .. No. 34 P. R. (Cr.) 1914.

(2) SECTION 25.

Confession in presence of a Police officer—admissibility of.

Held that a confession made by an accused person, while he was in the custody of a jailor, is admissible in evidence notwithstanding that a Police officer was present at the time when the confession was made.

I. L. R. 20 Bom. 795, followed.

... .. No. 8 P. R. (Cr.) 1914.

(3) SECTIONS 65 AND 74.

No secondary evidence admissible of contents of a document which is not a public document.

See *Indian Penal Code* (5).

... .. No. 1 P. R. (Cr.) 1914.

(4) SECTION 122.

Wife charged with murder of her husband's son by a former wife—admission of confession by wife to husband—value of retracted confession made while in Police custody.

Held, in proceedings in which the wife is charged with the murder of her husband's son by a former wife—confessions made by the wife to the husband and evidence of the alleged pointing out by her to him alone of the body of the child are not admissible in evidence, the crime not being one committed against the other within the meaning of section 122 of the Evidence Act.

24 P. W. R. 1913, referred to.

Held also, that a confession by the woman made while in Police custody, to which she had been relegated by her own husband and to

INDIAN EVIDENCE ACT, 1872—*concl.*

which she was remanded after the confession was made, is of little value when it is retracted only five days later before the same Magistrate.

I. L. R. 18 *Al.* 78, referred to.

... .. No. 10 P. R. (Cr.) 1914.

INDIAN LIMITATION ACT, 1908.

SECTION 5.

Not applicable to application under section 17 of the Press Act.

See *Indian Press Act*, 1910 (3).

... .. No. 16 P. R. Cr.) 1914 (F. B.).

INDIAN PENAL CODE.

(1) SECTIONS 24, 464, 466 AND 477A.

Unauthorised entries in Revenue Registers made by Patwari—without fraud or dishonesty.

The accused, a Patwari, made unauthorised entries in the *kkatauni* *partial* book and *jamabandi*, shewing certain donees of land as *mulikan qabza*, i. e., as proprietors of their holding merely, without any share in the *shamilat*, whereas previously they were shewn as full proprietors. The deeds of gift made no mention of the *shamilat* and it was therefore a moot point whether the gifts covered a share in the *shamilat* or not, and *prima facie* the new entries made by the accused were correct.

Held, that as it could not be said that the accused (who acted apparently *bona fide*) made the entries with intent to defraud, or dishonestly, within the meaning of section 24 of the Penal Code, he did not make a false document as defined by section 464, nor fraudulently alter any book or register within the meaning of section 477A, and his conviction under sections 466, 477A, must accordingly be set aside.

... .. No. 25 P. R. (Cr.) 1914.

(2) SECTION 27.

Possession by Mistress equivalent to that of wife—prosecution must however shew that possession was on account of her protector.

See *Excise Act*, 1896 (2).

... .. No. 20 P. R. (Cr.) 1914.

(3) SECTIONS 105, PART II, 117, 301 AND 325.

Right of private defence of property—death caused by some only of the members of an unlawful assembly.

Held, that the provisions of section 105, Part II of the Penal Code as to private defence of property apply only to *stolen* property, and not to property acquired dishonestly within the meaning of sections 103 and 111.

7 *Cr. L. J.* 49 and *I. L. R.* 36 *Cal.* 296, distinguished.

Held also, that acts done by some members of an unlawful assembly outside the common object of the assembly, and not of such a nature as the members of the assembly could have known to be likely to be committed in prosecution of that object, are only chargeable against the actual perpetrators of those acts.

Held further, that as it had not been proved which of the two assailants in this case had actually struck the one fatal blow neither

INDIAN PENAL CODE—*contd.*

could be convicted under section 304 of the Code, but that their offence fell under section 325.

I. L. R. 29 *All.* 282, referred to.

... .. **No. 37 P. R. (Cr.) 1914.**

(4) SECTION 149.

Members of a lawful assembly not liable for offence committed by one of them.

M. S. and his party were ploughing certain disputed land when the members of complainant's party came up to interfere with them and to turn them out. The Sessions Judge found that the latter were not justified in forcibly preventing the ploughing of M. S.'s party and that, on the other hand, M. S. was not justified in striking B. S. (one of complainant's party) on the head and thereby causing his death.

Held, that as the members of deceased's party were the aggressors, their object being to dispossess the other party from the land, M. S.'s party were perfectly justified in exercising their right of private defence and if M. S. exceeded that right, he, and he alone, was guilty of the offence and section 149 did not operate to make M. S.'s companions equally guilty with him, as they were not at the time members of an unlawful assembly.

... .. **No. 26 P. R. (Cr.) 1914.**

(5) SECTIONS 192 AND 196.

Copy of a document, not evidence—Indian Evidence Act, sections 65 and 74—meaning of "corruptly using evidence"—explanation consistent with the innocence of the accused.

Held, that in a criminal case the prosecution must exclude all explanation of the facts which is reasonably consistent with the innocence of the accused.

Held also, that there can be no fabrication of false evidence with the meaning of section 192, Indian Penal Code, if the evidence is not admissible in itself.

I. L. R. 6 *All.* 42, *I. L. R.* 21 *All.* 159 and 2 *Cal. L. J.* 46, referred to.

Held also, that a letter by a village *Nikah Khuran* to the Moharrir in charge of the central office, in which entries in the village register are copied, informing him that he had been told that a woman whose marriage he had effected had not been divorced by her former husband, and asking that no action be taken on his report of the marriage, is not a public document within the meaning of section 74 of the Evidence Act, and consequently under section 65 no secondary evidence of its contents is admissible in evidence.

Held also, that the production of a copy of that letter was an attempt to use the original.

6 *W. R.* 41 (Cr.) and *I. L. R.* 28 *All.* 402, referred to.

Held further, that the production of the copy by the accused person with the intention of procuring a false conviction was a

INDIAN PENAL CODE—*contd.*

corrupt intention within the meaning of section 196 of the Indian Penal Code, and he was therefore rightly convicted under that section.

Criminal Revision 26 of 1909 (unpublished), *I. L. R.* 5 *Cal.* 717, 7 *W. R.* 23 (*Cr.*) and *I. L. R.* 7 *Mad.* 289, referred to.

... .. **No. 1 P. R. (Cr.) 1914.**

(6) SECTION 300, CLAUSES 1-4.

Murder—intention.

The two accused, brothers, between whom and the deceased and his son was bad feeling, came upon the deceased in the fields and setting upon him, beat him with sticks so severely that he died within a few minutes, no less than 14 ribs being fractured resulting in rupture of both lungs and of the spleen—the Sessions Judge found the accused guilty of murder under the fourth clause of section 300 of the Penal Code.

Held by the Chief Court, that the crime fell under the first or second clause of section 300 of the Penal Code, as the intention was clear whether to kill or to cause dangerous injury and thus the case was taken out of the purview of clause 4 which applies to cases in which there is no wish to kill or to hurt.

... .. **No. 31 P. R. (Cr.) 1914.**

(7) SECTIONS 379, 422, 459 AND 511.

Trespass in a building—whether cattle enclosure is a building—attempt to steal.

Accused was found guilty under section 457 of the Penal Code, of having committed lurking house trespass by night by entering the complainant's cattle enclosure with intent to commit theft of the cattle.

Held, that the cattle enclosure, which was merely a piece of ground enclosed on one side by a wall and on the other three sides by a thorn-hedge, was not a "building" within the meaning of section 442 of the Penal Code, and the conviction under section 457 was consequently bad.

57 *P. R. (Cr.)* 1887, 28 *P. R. (Cr.)* 1905 and 35 *P. R. (Cr.)* 1879 (*F. B.*), referred to.

Held also, that the accused was guilty of the offence of an attempt to commit theft under section $\frac{379}{511}$ and that the attempt began when entry was effected into the enclosure by making a hole in the hedge.

Sir James Stephen's Digest of Criminal Law, article 49, referred to

... .. **No. 24 P. R. (Cr.) 1914.**

INDIAN PENAL CODE—*contd.*

(8) SECTIONS 401 AND 413.

Wandering gang of thieves—essentials constituting the offence—the receiver of the stolen property (the Agoa) is a member of the gang.

Held that under section 401 of the Indian Penal Code, it is necessary to prove—

- (1) that there existed a gang of persons ;
- (2) that those persons were associated for the purpose of committing theft or robbery ;
- (3) that theft or robbery was to be committed habitually ; and
- (4) that the accused was a member of such gang ;

But that it is not necessary to prove that each individual member of the gang has habitually committed theft or has committed any particular theft in company with the other members.

Once it is proved that a gang, however small, was formed for the purpose of habitually committing theft, all persons who thereafter joined that gang in committing one or more thefts, come within the purview of section 401.

Held also, that the fact that an accused person is of bad character or is reputed to be a thief, or an habitual thief, is no evidence against him for the purpose of a charge under section 401 of the Penal Code.

1 *Cal. W. N.* 146, 1 *I. L. R.* 27 *Cal.* 139, 1 *I. L. R.* 32 *Mad.* 179, referred to ; also

6 *M. H. C. R.* 120, 37 *P. R. (Cr.)* 1869, 9 *P. R. (Cr.)* 1880, 6 *All. W. N.* 15, 6 *All. W. N.* 16, 6 *All. W. N.* 65, 18 *P. L. R.* 1910, 10 *Indian Cases* 833 and 36 *P. W. R.* 1912.

Held further, that the Agoa (the habitual receiver of the stolen property in the interest of the members of the gang) though not a thief himself, is a principal member of the gang and that his case falls equally within the provisions of section 401 of the Penal Code.

... .. **No. 13 P. R. (Cr.) 1914.**

(9) SECTIONS 415, 419.

Cheating by impersonation—inducing a Muharrir of a fair to write wrong names into the sale certificate of a mare.

Ahmada and Lalu, accused, induced the muharrir at a fair to write out a certificate of sale of a mare giving Sultan as the name of the seller and Lalu as the purchaser. Ahmada posed as Sultan, and affixed thereto his thumb mark. It was found by the Sessions Judge that (i) it was not proved that the mare was stolen property, (ii) it was, however, come by in some doubtful fashion, (iii) that the muharrir was deceived.

Held, that the petitioners were rightly convicted under section 419 of the Penal Code, whatever reason they had for deceiving the muharrir and inducing him to write a false certificate.

36 *P. R. (Cr.)* 1888 and 20 *P. R. (Cr.)* 1889 (*F. B.*), followed.

1 *I. L. R.* 17 *Cal.* 606 and 12 *Cal. W. N.* 750, referred to,

INDIAN PENAL CODE—*conold.*

Held also, that the deliberate opinion of an expert that two thumb-marks agree is on a different plane from an opinion as to handwriting and such evidence was in this case sufficient to prove Ahmada, accused's thumb-mark to the certificate.

18 *P. W. R.* 1912 (p. 28), 1 *Cal. L. J.* 385, and *I. L. R.* 32 *Cal.* 759 (765), referred to

... .. **No. 9 P. R. (Cr.) 1914.**

(10) SECTION $\frac{420}{311}$.

Attempt to cheat.

Accused, having manufactured at home certain spurious trinkets, took them to a goldsmith, shewed them to him, said they were of gold (which they were not), and that they were stolen property (which was also untrue), said he did not wish to sell them in the bazar and said *kharid ho*. The goldsmith did not buy and the negotiations went no further.

Held, that on these facts, the accused was rightly convicted of an attempt to cheat under section $\frac{420}{311}$ of the Penal Code.

I. L. R. 8 *Al.* 304, 13 *P. R. (Cr.)* 1879, 13 *P. R. (Cr.)* 1881, 40 *P. R. (Cr.)* 1885, 25 *P. R. (Cr.)* 1902, 15 *P. R. (Cr.)* 1907, 6 *Al.* *W. N.* 290, *I. L. R.* 16 *Cal.* 310, *I. L. R.* 16 *Al.* 409, and *I. L. R.* 15 *Al.* 173, referred to.

... .. **No. 14 P. R. (Cr.) 1914.**

INDIAN PRESS ACT, 1910.

(1) SECTIONS 4 (c), 17, 19 AND 20.

Court cannot reduce penalty inflicted by the Local Government.

Held, that it had not been shown that the Government order was wrong on the merits.

Held, further, that the Court had no authority under section 19 to reduce the penalty without setting aside the order of forfeiture.

... .. **No. 28 P. R. Cr.) 1914 (F. B.)**

(2) SECTIONS 4 (c), 17 AND 20.

Application to Chief Court to set aside order of forfeiture—whether "Local Government" was included in term "Government"—General Clauses Act, X of 1897, section 3 (21) and (29)—expressions of professed loyalty on other occasions—no excuse.

Held, following 14 *P. R. (Cr.)* 1913 (F. B.), that the term "Government established by law in British India" as used in section 4 of the Press Act, included a Local Government.

Held also, that the Court was not concerned with the motives for writing the articles in question. The point to be decided was, whether the articles were likely to bring Government into hatred or contempt or to excite hatred or contempt against the Christian subjects of His Majesty in India.

Held further, that no amount of professed loyalty on other occasions could be taken as nullifying the probable effects of the writing contained in the articles concerned and that the applicant had entirely failed to prove that Government had established no case for forfeiture.

... .. **No. 27 P. R. Cr.) 1914 (F. B.)**

INDIAN PRESS ACT, 1910.—*concluded.*

(3) SECTION 17.

Period of limitation—interpretation of statutes—power to extend period—Indian Limitation Act, IX of 1908, section 5.

Held, that when the language of an Act is plain and admits but of one meaning, it must be enforced and that the Courts are not concerned with any question of the reasonableness of the enactment or of the policy or possible intention of the legislature.

"Maxwell's Interpretation of Statutes," 1905 Edition, pp. 4 and 5, referred to.

Held, consequently, that limitation for an application under section 17 of the Press Act starts from the date of the order of forfeiture.

Held further, that the provisions of section 5 of the Limitation Act are not applicable to such an application.

... .. No. 16 P. R. (Cr.) 1914 (F. B.)

INDIAN RAILWAYS ACT, 1890.

SECTIONS 47 AND 122.

Trespass on railway line—punishable under latter section—meaning of "unlawfully."

Held, that a person may be guilty of *unlawfully* entering upon a railway within the meaning of section 122 of the Railways Act, notwithstanding that no rule has been framed under section 47 (1) (g) making such an act an offence.

Criminal Revision 56 of 1893 (unpublished), dissented from.

Held also, that no rule properly made under clause (g), sub-section (1) of section 47 would have reference to a trespass by a member of the general public upon a railway line, as contemplated by section 122.

Held further, that the word "unlawfully" as used in section 122 means "without the leave of the Railway administration."

I. L. R. 30 Bom. 348, approved.

... .. No. 4 P. R. (Cr.) 1914.

INTERPRETATION OF STATUTES.

Plain language must be given effect to.

See *Indian Press Act*, 1910 (3).

... .. No. 16 P. R. (Cr.) 1914 (F. B.)

J

JOINT TRIAL.

Of 2 persons under section 110, Criminal Procedure Code, only admissible when their association in the same offences is made out.

See *Criminal Procedure Code*, 1898 (4).

... .. No. 21 P. R. Cr.) 1914.

L

LEGAL PRACTITIONERS ACT, 1879.

SECTION 3.

As amended by Act XI of 1896—touts—Revision by Chief Court of order of a District Magistrate framing a list of touts—Punjab Courts Act, XVIII of 1881, section 13.

Held, that the Chief Court has no power to revise an order of a District Magistrate under section 36 of the Legal Practitioners Act,

LEGAL PRACTITIONERS ACT, 1879—*concluded*.

directing that the name of a person should be included in a list of touts, such an order being neither a criminal nor a civil proceeding, nor subject to the Chief Court's power of superintendence and control under section 13 of the Punjab Courts Act.

I. L. R. 21 *All.* 181, *I. L. R.* 31 *All.* 59, 11 *Cal. L. J.* 513, 16 *Indian Cases* 895, 11 *P. R. (Cr.)* 1888 and 11 *P. R. (Cr.)* 1909, referred to.

3 *P. R. (Cr.)* 1900, disapproved.

... .. No. 18 *P. R. (Cr.)* 1914.

LIMITATION.

For an application under section 17, Press Act, starts from date of order of forfeiture.

See *Indian Press Act*, 1910 (3).

... .. No. 16 *P. R. (Cr.)* 1914 (F. B.).

M

MURDER.

Intention to kill or cause dangerous injuries.

See *Indian Penal Code* (6).

... .. No. 31 *P. R. (Cr.)* 1914.

P

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See *Indian Press Act*, 1910 (2).

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(2) Chief Court has no power to reduce the penalty.

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See *Indian Penal Code* (5).

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See *Legal Practitioners Act*, 1879.

... .. No. 18 *P. R. (Cr.)* 1914

S

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Grounds for refusing sureties offered—reference to Sessions Judge.

See *Criminal Procedure Code*, 1898 (2).

... .. No. 6 P. R. (Cr.) 1914.

T

THEFT.

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See *Indian Penal Code* (7).

... .. No. 24 P. R. (Cr.) 1914.

TRESPASS.

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See *Indian Penal Code* (7).

... .. No. 24 P. R. (Cr.) 1914.

TOUTS.

Chief Court's power to revise order of District Magistrate directing that the name of a person is to be included in a list of tout.

See *Legal Practitioners Act*, 1879.

... .. No. 18 P. R. (Cr.) 1914.

U

UNLAWFUL ASSEMBLY.

(1) Party ploughing disputed land acting in self-defence : whether all responsible for one of them causing death of one of the other party.

See *Indian Penal Code* (4).

... .. No. 26 P. R. (Cr.) 1914.

(2) Death caused by one of an unlawful assembly outside common object of assembly—liability of other members of assembly.

See *Indian Penal Code* (3).

... .. No. 37 P. R. (Cr.) 1914.

W

WANDERING GANG OF THIEVES.

Essentials constituting the offence under section 101, Penal Code.

See *Indian Penal Code* (8).

... .. No. 13 P. R. (Cr.) 1914.

WIFE.

Evidence of what her husband told her—relevancy of—in criminal cases.

See *Indian Evidence Act*, 1872 (1).

... .. No. 34 P. R. (Cr.) 1914.

WORKMEN'S LIABILITY ACT, 1859.

(1) *Contract to perform agricultural service and prescribing a penalty for its breach.*

Held, that Act XIII of 1859 does not apply to a contract to perform agricultural services.

I. L. R. 7 Bom. 379, followed.

Held also, that the remedy prescribed by the Act cannot be enforced where the contract itself prescribes a penalty for its breach.

96 *P. L. R.* 1914, followed.

... .. No. 38 P. R. (Cr.) 1914.

(2) SECTION 2.

Advances of stores, not money.

Held, that section 2 of Act XIII of 1859, does not apply to advances in stores and not in money.

... .. No. 23 P. R. (Cr.) 1914

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C

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Held, that after a new colony has been in existence for twelve or fifteen years and has become firmly established, a grantee, who has not acquired proprietary rights, retains his technical liability to fulfil the condition of personal residence, but the existence of a habitable house should be accepted as sufficient evidence of residence and further inquisition into the habits of the grantee should be avoided.

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See *Punjab Tenancy Act*, 1887 (1).

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P

PUNJAB LAND REVENUE ACT, 1887.

SECTION 115.

The rule of *res judicata* is not applicable to orders of Revenue officers in partition proceedings.

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... .. No. 5 P. R. (Rev.) 1914.

PUNJAB TENANCY ACT, 1887.

(1) SECTION 8.

Acquisition of occupancy rights by tenants breaking up waste—Manza Ganga, Tahsil Sirsa.

Held, that the decision in Revenue Case No. 406 of 1897-98 by Thorburn, F. C., did not establish a new principle of law conferring occupancy rights under section 8 of the Tenancy Act on all tenants in the old Sirsa district who had broken up waste prior to 1882, but provided merely a new criterion by which each claim to such rights might equitably be decided in the absence of any express clause in the administration paper of the village conferring such rights.

Held also, that the application of the said criterion depends upon the particular facts of each case and that the question at issue in every such case is one of fact, whether the circumstances, and in particular the rate of rent paid, point to the conclusion that at the time when the waste was broken up tenants were so scarce as to be in a position to dictate their own terms. In cases where the breaking up of waste took place prior to 1882 the probability that tenants were so scarce is greater than in cases where it took place later, but the probability is not to be taken as a certainty in any case and all the circumstances must be examined.

Rev. Cases No. 5 of 1881-82 (unpublished) and No. 106 of 1897-98 (now printed, at p. 16), referred to.

... .. **No. 6 P. R. (Rev.) 1914.**

(2) SECTIONS 38 AND 59 (1) (b) AND (c).

Abandonment of occupancy rights by widow—succession by male collaterals—abandonment by the collaterals, by not cultivating for more than a year before taking possession.

Held that if a widow who has succeeded to occupancy rights, abandons the tenancy by non-cultivation within the scope of section 38 of the Tenancy Act, the occupancy rights at once devolve on the next claimant, *vide* section 59 (1) (b) and (c).

Held also, that the next claimant does not become a "tenant having the right of occupancy" within the meaning of section 38 until he has entered into possession, and consequently cannot be held to have abandoned his occupancy right under that section before that time.

... .. **No. 2 P. R. (Rev.) 1914**

(3) SECTIONS 15 AND 84 (5).

Notice of ejectment against tenants—suit to contest notice dismissed in default—no decree for ejectment of tenants—tenants ejected notwithstanding in execution proceedings—Revision.

The landlords (respondents) caused notice of ejectment under section 15 (1), Punjab Tenancy Act, to be served on the tenants (petitioners). It had previously been held in judicial proceedings that the tenants were not liable to ejectment from one of the fields, No. 713, but this was overlooked in dealing with the notices of ejectment.

PUNJAB TENANCY ACT, 1887—*continued*.

The tenants sued to contest the notice and obtained an *ex parte* decree which was however set aside subsequently and when the case came up again the tenants absented themselves and their suit was dismissed in default.

In passing orders the Court did not direct the ejectment of the tenants under section 45 (6) of the Act. In execution proceedings possession was however given to the landlords.

Held, that a technical irregularity, such as the Court's omission to direct the ejectment of the tenants may have been, is not a good ground for interference by the Financial Commissioner on the revision side, such interference being only justified where it is necessary in order that substantial justice may be done.

Held also, that the fact that the ejectment proceedings were twice in succession decided otherwise than upon the merits did not justify such interference in the absence of any indication of material irregularity.

Held, however, that the wrongful inclusion in the notices of ejectment of the field No. 743 and the subsequent delivery of possession of this field was a material irregularity and must be rectified.

... .. No. 4 P. R. (Rev.) 1914.

(4) SECTION 48 (5).

Financial Commissioner's power of revision—when exercised.

Held, that the circumstances which would justify the Court of the Financial Commissioner on its revision side, in holding that a subordinate Court had acted either without jurisdiction or illegally or with material irregularity, when on the facts found by that Court there is no such lack of jurisdiction and no illegality or material irregularity, would have to be of a very exceptional kind, such as, *e. g.* absolute perversity in the finding or a serious misapplication of the law of evidence in arriving at it and that the broad principle to follow is to interfere only when a refusal to interfere would result in injustice or failure of justice.

2 P. R. (Rev.) 1910, referred to.

Held consequently, that there is no ground for interference in the present case where two Courts have found as a matter of fact supported by the Revenue Records that the relation of landlord and tenant exists between the parties and there is no suggestion that this decision has resulted in injustice.

... .. No. 1 P. R. (Rev.) 1914

R

RES JUDICATA.

Civil Procedure Code, 1908, section 11—whether applicable to orders by Revenue officers in partition cases—Punjab Land Revenue Act, XVII of 1887, section 115—discretionary powers of Revenue officers, explained.

Held, that section 11 of the Code of Civil Procedure does not apply to orders passed by Revenue officers in partition cases.

6 P. R. (Rev.) 1868, referred to.

Held also, that a Revenue officer has discretionary authority under section 115 of the Punjab Land Revenue Act, to disallow an

RES JUDICATA—concl.

application for partition and that he ought to use this authority in every instance in which the same question has been previously decided, unless it is shewn that the circumstances, which made the previous order appropriate, have changed.

“ “ “ “ “

.. **No. 5 P. R. (Rev.) 1914.**

REVISION (FINANCIAL COMMISSIONER).

Grounds for—discussed.

See *Punjab Tenancy Act*, 1887 (4).

“ “ “ “ “

... **No. 1 P. R. (Rev.) 1914.**

CIVIL JUDGMENTS,
1914.

Chief Court of the Punjab.

CIVIL JUDGMENTS.

No. 1.

Before Hon. Mr. Justice Kensington and
Hon. Mr. Justice Bradon.

GANGA RAM—(PLAINTIFF)—APPELLANT,

Versus

NARAIN DAS—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 987 of 1911.

Estoppel—subsequent suit by person who acted as guardian ad-litem in previous suit and then omitted to set up his personal claims.

One B. D., the *Mahant* of a shrine, made a gift of the property in suit to S. R., a minor—N. D. claiming to be a *chela* of B. D. brought a suit against the minor donee for possession of the property (G. R. acted for the latter as guardian *ad litem*) and a decree was passed in favour of N. D., who thereon got possession of the property. G. R. now sues N. D. for possession of the property on the ground that he is heir to B. D. and as such entitled to the property—

Held, that the fact that plaintiff omitted in the previous suit to plead that he is heir of B. D., and that N. D., the then plaintiff, had no *locus standi* to contest the gift in favour of S. R., did not debar him from seeking to enforce his own alleged personal rights in the present suit.

Mohunt Das v. Nilkomul Dewan (1), approved.

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge of the Ludhiana Division, dated 23rd May 1911.

Badr-ud-Din, for appellant.

Ramblhaj Datta, for respondent.

The judgment of the Court was delivered by—

BRADON, J.—The property in dispute in this case is property attached to a shrine at Jasar in the Ludhiana District. Bishan Das, deceased, who was *Mahant* of this shrine, appears to have had four *chelas*, of whom two are said to have died leaving no representatives. The other two were Narain Das, defendant in the present case, and another, Narain Das, deceased, who had two *chelas*, namely, Ganga Ram, plaintiff in the present

19th April 1913.

case, and Sant Ram, a minor. Bishan Das made a gift of the property now in dispute to Sant Ram and after Bishan Das' death, Narain Das, the present defendant, brought a suit against the minor donee, Sant Ram, for possession of the property. In that suit Ganga Ram, the present plaintiff, acted as guardian *ad litem* of the then minor defendant, Sant Ram, and the suit was decided in favour of Narain Das, who is now in possession of the property.

Ganga Ram now sues Narain Das for possession of this property alleging that the shrine at Jasar is subordinate to the main institution situate at Kadon in the Patiala State, of which Bishan Das was the *Mahant*, that Bishan Das appointed him (Ganga Ram) to be his heir, that he (Ganga Ram) is the *Mahant* in possession of the main institution at Kadon, and that he (Ganga Ram), and not Narain Das, is entitled to the property attached to the shrine at Jasar as heir of Bishan Das.

The suit has been dismissed on a preliminary point. In effect the finding of the lower Courts is that Ganga Ram, having omitted in the previous suit to plead that he is the heir of Bishan Das, and that Narain Das had no *locus standi* in a suit to contest the gift, is now estopped from urging that he is Bishan Das' heir.

Ganga Ram was not a party to the previous suit. He was then acting in the capacity of guardian of Sant Ram and the pleadings had no reference whatever to his own interests in the property but were the pleadings of Sant Ram. In the present suit Ganga Ram is seeking to enforce his own alleged personal rights, and as he is acting in an entirely different capacity, it is difficult to see how the previous suit can affect him in any way.

Ganga Ram did not wish to dispute the gift, but this fact does not show that, in the absence of such a gift, he would not at once have claimed the property as heir of Bishan Das. Narain Das had instituted his suit against Sant Ram before Ganga Ram was called upon to plead in the capacity of guardian, and in carrying on the suit to the final execution of his decree, Narain Das was not acting on any belief, arising from any act or omission on the part of Ganga Ram, that Ganga Ram had waived his right to claim as heir of Bishan Das.

We are unable to agree with the lower Courts that Ganga Ram is estopped from urging his claim as heir of Bishan Das and in this view we are supported by the decision in *Mohant Das v. Nilkomul Dewan* (1). In that case a son, against whom

a suit ought to have been instituted, conducted on behalf of his mother a suit wrongly brought against her, knowing all the time that he, and not the mother, should have been sued, but there was nothing to show that it was by reason of any representation or conduct of the son that the plaintiff was led to think that the mother was the right person to be sued, and it was held that the decree in that suit was not binding on the son, and did not estop him, in a subsequent suit against him, from contesting the validity of that decree.

We accordingly accept the appeal and, setting aside the lower Appellate Court's decree, we remand the case under order XLl, rule 23, Civil Procedure Code, for decision on the merits.

Court-fees to be refunded. Other costs to be costs in the cause.

Appeal accepted.

No. 2.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon. Mr. Justice Kensington.

TAHL DAS AND OTHERS—(PLAINTIFFS)—APPELLANTS
Versus
 MALIK SINGH AND OTHERS—(DEFENDANTS)—
 RESPONDENTS.

Civil Appeal No. 1023 of 1910.

Custom—alienation—agricultural Brahmans of Tahsil Gujar Khan, Rawalpindi district, are governed by custom.

Held, that agricultural Brahmans of Tahsil Gujar Khan, Rawalpindi District, are governed by the ordinary agricultural custom limiting the alienation of ancestral property.

56 P. R. 1909 (*Devi Ditta Singh v. Dropti*) (1), followed.

125 P. R. 1908 (*Hira Nand v. Hari Chand*) (2), and 1 P. R. 1910 (*Musammamat Maya v. Gurdit Singh*) (3), distinguished.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Rawalpindi, dated the 22nd June 1910.

Mehr Chand and Gokal Chand, for appellants.

Sangam Lal, for respondents.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—The parties are Brahmans of a village in Tahsil Gujar Khan, Rawalpindi.

(1) 56 P. R. 1909.

(3) 1 P. R. 1910.

(2) 125 P. R. 1908.

The first question for consideration is whether, the law to be applied is Hindu or the ordinary agricultural customary. The lower appellate Court has applied Hindu law on the grounds that 125 P. R. 1908 (*Hira Nand v. Hari Chand*) (1) and 1 P. R. 1910 (*Mussammal Maya v. Gurdit Singh*) (2) are in point, that the oral evidence does not establish a custom modifying Hindu law, and that the parties combine service in the army with agriculture.

The finding of the Court of first instance, that this of the present owners are Brahmans, has not been contested. The lower appellate Court has not referred to 56 P. R. 1909 (*Devi Ditta Singh v. Dropti*) (3), cited before it was reported in the Punjab Record and distinguished at some length in 125 P. R. 1908, the distinguishing features being that in 56 P. R. 1909 the village in which the land in suit was situate was mainly owned by Brahmans, most of the landowners being of that caste and being essentially agricultural Brahmans, though some few of them eked out a living by taking service, while in 125 P. R. 1908 (*Hira Nand v. Hari Chand*) (1), the main occupation of the parties was service or the performance of priestly functions. They did not "live on agriculture as a profession" and the whole of their land was cultivated by non-occupancy tenants. It was further found in 125 P. R. 1908 (*Hira Nand v. Hari Chand*) (1), that there were only five Brahman families in the village, which was held on a *bhayachara* tenure, and that the village community consisted of many different castes, the lambardar being a Muhammadan Gujar. In 1 P. R. 1910 (*Mussammal Maya v. Gurdit Singh*) (2) the parties cultivated their land through servants, had been in possession for a few generations and followed other pursuits besides agriculture, the land of the clan in the village comprised 50 acres only, and the Brahmans did not form a compact village community but were merely a few landowners.

The facts of the present case are practically on all fours with those of 56 P. R. 1909 (*Devi Ditta Singh v. Dropti*) (3) and differ widely from those dealt with in the 1908 and 1910 cases cited above. The materials on the record do not justify the conclusion that these agricultural Brahmans are governed by Hindu law, and we hold that the ordinary agricultural custom, limiting alienation of ancestral property, is applicable. Tahl Das, the present appellant, is lambardar of the village

(1) 125 P. R. 1908.

(3) 56 P. R. 1909.

(2) 1 P. R. 1910.

and was originally the sole plaintiff. Other collaterals joined him as plaintiffs, having originally been made formal defendants, but they have not joined in this appeal.

The suit was for a declaration that the gift of ancestral land to the donor's daughter's son would not affect the plaintiff's reversionary rights after the death of the donor. The donor and his wife were blind, and we are satisfied that the donee's parents lived with them, so far as was compatible with the donee's father being in the army, and served and maintained them. The evidence on the record and the Customary Law applicable justified the gift and it is significant that the appellant, whose share of the land in suit (216 *kansals*) is one-twelfth or one-eighteenth, is the sole objector. There is no force in the argument that order XL1, rule 4 of the Code of Civil Procedure, is applicable to the case, and that the appellant represented all the shareholders. The fact that the donee's father has not been proved to have been a *khandanad* in the strict sense of the term does not affect our conclusion that the gift was valid against the collaterals. He married both the daughters of the donor and lived with him, and it is by no means improbable on the record that the donee's mother, his second wife, did not leave her father's house, except to live with her husband when he was serving with his regiment.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

No. 3.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice
Scott-Smith.*

ALLA DITTA AND OTHERS—(PLAINTIFFS)—APPELLANTS

Versus

GAUHRA AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1277 of 1910.

Custom—succession—heirless estate—proprietors of the patti—Wajib-ul-arz—Riwaj-i-am—Jullundur Tahsil—extent of widow's estate in absence of collaterals.

S., the last male proprietor of the land in suit, died childless leaving a widow, who succeeded to his land. On her death her brother's son (defendant) obtained possession and claimed to hold it under a will in his favour by the widow. Plaintiffs, the proprietors of the *patti*, sued for possession claiming to be entitled to the property in the absence of collaterals of S., and that the will in favour of defendant was invalid.

Held, that the *onus* of proving a right of succession by custom lay upon the plaintiffs and they had failed to discharge that *onus* and that the entry in the village *Wajib-ul-arz*, restricting a widow's power of alienation, was only inserted in the interests of collaterals and had no effect, where there were none.

102 P. R. 1906 (*Harnam Singh v. Partab Singh*) (1), 18 P. R. 1910 (*Dasaunda Singh v. Mangal*) (2) and 137 P. R. 1908 (*Nihala v. Rahmat Ullah*) (3), followed.

2 P. R. (Rev.) 1911 (*Wazira v. Mangal*) (4), referred to.

Also that the entry in para. 59 of the *Ricaj-i-am* of the Jullundur *Tahsil* was not applicable to the case of a village or *patti* where the proprietors are of different tribes and would not in the absence of any instance in support of it, be sufficient proof of a custom entitling plaintiffs to succeed.

Held, also that a widow's estate is only limited for the benefit of reversioners and where there are none, she is to all intents and purposes an absolute owner.

Further appeal from the decree of H. Harcourt, Esquire, Divisional Judge of the Jullundur Division, dated the 29th August 1910.

Pestonji Dadabhai, for appellants.

Devi Chand, for respondents.

The judgment of the Court was delivered by—

14th May 1913.

SCOTT-SMITH, J.—Suba, the last male proprietor of the land in suit, died, leaving a widow, Mussammatt Hukman. After her death, Gauhra, her brother's son, obtained possession of the land and claims to hold under a will executed in his favour by Mussammatt Hukman. Plaintiffs, the proprietors of the *patti*, sued for possession on the ground that Mussammatt Hukman had no power to alienate the land, except for necessity, and that, in the absence of collaterals, they were entitled to succeed. The first Court decreed their claim.

The lower Appellate Court relying upon 102 P. R. 1906 (*Harnam Singh v. Partab Singh*) (1) and 18 P. R. 1910 (*Dasaunda Singh v. Mangal*) (2), dismissed plaintiffs' suit. They have filed a further appeal in this Court.

The first question for decision is, upon which party the *onus* lay?

We have no hesitation in holding that it lay upon the plaintiffs. The rulings cited by the Divisional Judge are in point and so is 137 P. R. 1908 (*Nihala v. Rahmat Ullah*) (3). In the 1908 and 1910 cases the dispute was between the

(1) 102 P. R. 1906.

(2) 18 P. R. 1910.

(3) 137 P. R. 1908.

(4) 2 P. R. (Rev.) 1911.

proprietors of the *patti* and a blood relation of the deceased proprietor. In 102 P. R. 1906 (*Harnam Singh v. Partab Singh*) (1) the principal defendant claimed to be related to the deceased proprietor, but the claim of the plaintiffs, proprietors of the *patti*, was dismissed solely on the ground that they had not discharged the *onus*, which lay on them.

In the present case, as in the 1906 one, the proprietors are not a compact body, but are of miscellaneous tribes. The counsel for appellants relies upon the village *Wajib-ul-arz* and the *Riwaj-i-am* of the Jullundur *Tahsil*. According to the former a widow is not allowed to make a gift to any of her paternal relations. This provision was of course inserted in the interest of the collaterals and has no effect where there are none, and where there is consequently no one competent to challenge an alienation by a widow. As regards the *Riwaj-i-am* we agree with the view taken of it by the lower appellate Court. We do not think it can have been intended to apply to the case of a village or *patti* where the proprietors are of different tribes. In the absence of any instance we certainly are not prepared to hold that the entry in question is sufficient proof of a custom entitling the proprietors of the *patti* to succeed to Suba's land.

Mr. Pestonji urges that the widow's estate is always a limited one. Quite so, but it is only limited for the benefit of reversioners. Where there are none she is to all intents and purposes an absolute owner. Counsel referred us also to 2 P. R. (Rev.) 1911 (*Wazira v. Mangal*) (2), but we cannot find anything there which assists his contention. The 5th proposition laid down therein by the Financial Commissioner is against him. To sum up, we hold that the *onus* was upon the plaintiffs and they have not discharged it. The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 4.

Before Hon. Mr. Justice Shah Din and

Hon. Mr. Justice Agnew.

CHHABIL DAS—(PLAINTIFF)—APPELLANT

Versus

MASSU AND ANOTHER—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 889 of 1911.

Civil Procedure Code, 1908—splitting of causes of action—novation.

C. D. was mortgagee under a deed which provided, *inter alia*, that the mortgagors were to remain in cultivating possession, and that they were to

pay to C. D. $\frac{1}{4}$ th of the produce by way of interest. The deed further recited that, if the mortgagees failed to pay the $\frac{1}{4}$ th share of the produce to C. D., he would have the right to take possession of the land mortgaged. The deed did not recite that, if the produce by way of interest was not paid, C. D. might recover the unpaid interest. It appeared that in 1897 C. D. sued the mortgagors and obtained a decree for the value of produce then due, in lieu of interest: he did not claim possession. In the present suit on further default C. D. sued the mortgagors for possession and a certain sum on account of produce. In their pleas the defendants stated, *inter alia*, that they had failed to pay produce in *Kharif* 1907 and *Rabi* 1908, but had paid before these harvests.

Held, that the present suit was barred under order 2, rule 2, Civil Procedure Code, 1908, and that the fact that the mortgage-deed did not specifically give C. D. the right to sue for the produce on default did not take away his inherent right so to do.

Held further, that the admission by the mortgagors of payment of produce between the date of the previous decree and the year 1907 did not operate to do away with the bar created by the previous suit under order 2, rule 2, Civil Procedure Code, or to create a new cause of action to sue for possession in terms of the mortgage, inasmuch as it was not open to the parties *inter se* to override the rule as to splitting of causes of action.

19 P. R. 1910 (*Chaudhri Kudan Mal v. Sardar Allah Dad Khan* (1)), followed.

28 P. R. 1907 (*Ganga Ram v. Abdul Rahman*) (2), *Trimbak v. Bhagwan Das* (3) and *Dubash Kader v. Takeer Meera* (4), referred to.

Further appeal from the decree of H. Scott-Smith, Esquire, I.C.S., Additional Divisional Judge, Multan, at Ferozepore, dated the 31st March 1911.

Sheo Narain, for appellant.

Rajindar Parshad, for respondents.

The judgment of the Court was delivered by—

26th May 1913.

AGNEW, J.—The suit was by the plaintiff-mortgagee for possession of certain land mortgaged to him on 20th January 1896 and for Rs. 375-5-0 on account of produce. The mortgage was without possession, the land revenue to be paid by the mortgagor who remained in cultivating possession and was to pay $\frac{1}{4}$ produce as interest to the mortgagee. The deed further recites that, if the mortgagor does not deliver produce to the mortgagee, or if he fails to cultivate the land, the mortgagee shall have the right to take possession. The mortgage-deed does not in terms recite that, if the produce by way of interest is not paid, the mortgagee may recover such unpaid interest

(1) 19 P. R. 1910.

(2) 28 P. R. 1907.

(3) (1898) 1 L. R. 23 Bom. 348.

(4) (1909) 8 Indian Cases 445.

by way of rent or otherwise. The only remedy for non-payment specifically provided is that the mortgagee may assume possession when default is made.

The pleas of the defendants were that they had not agreed to any condition to give possession to the mortgagee if they failed to pay produce, *that they had failed to pay produce in Kharif 1907 and Rabi 1908, but had paid before these harvests*, and finally, that as plaintiff had brought suits for recovery of produce in lieu of interest before and had not in those suits claimed possession, his present claim was barred under order 12, rule 2. Civil Procedure Code.

Both the lower Courts have held that the suit was cognizable by a Civil Court, and that the plaintiff's claim is barred by order 2, rule 2.

In this appeal counsel for appellant urges that—

(1) the claim was one cognizable by a Revenue Court ;

(2) that although the mortgagee sued the mortgagors for value of produce in lieu of interest in 1897 and obtained a decree in February 1898, and in that suit did not claim possession, yet the admission of the mortgagor-defendants that they paid produce between 1897 and Rabi 1907, removes the case from the operation of order 2, rule 2.

The first of these contentions is not seriously pressed by counsel and we are satisfied that the suit was one for the decision of a Civil Court. Under the terms of the mortgage-deed produce was to be paid by way of interest and the mortgagor remained in possession. The right of proprietary possession was not transferred by the mortgagee to the mortgagor and in no sense can the latter be said to have "held the land under" the mortgagee. Following the principle laid down in 46 P. R. 1894 (*F. B.*) (*Buta Shah v. Kalu*) (1), we hold that the suit was cognizable by a Civil Court.

On the second point the argument of appellant's counsel may be briefly summarized as follows :—

On the terms of the mortgage-deed of 20th January 1896 the plaintiff-appellant had no right to sue for recovery of produce. His only remedy was that provided by the mortgage-deed itself, *viz.*, that he should assume possession, if default in payment were made. The decree of 5th February 1898 under which plaintiff recovered the value of produce then due

should never have been passed, since the only remedy for failure to pay produce open to plaintiff under his mortgage-deed was to sue for possession. The plaintiff's right under the mortgage-deed to have possession on default made in payment of interest was not lost when he obtained his decree for produce and omitted to sue for possession, even though order 2, rule 2, may stand in the way of his enforcing his claim by way of suit, and as defendants have admitted payment of produce between 1897 and 1907 that admission operates to revive the plaintiff's right to sue for possession in the face of order 2, rule 2.

In reply, counsel for the defendant-respondents points out that, although the mortgage-deed of 20th January 1896 does not provide that if produce by way of interest be not paid by the respondents the plaintiff-mortgagee may sue for its recovery, such a right to sue is inherent in the mortgagee and follows upon the obligation of the mortgagor to pay produce. We hold that this view must prevail. The terms of a mortgage-deed such as this, drawn up as it was by an unskilled draftsman, must not be construed too strictly. The object of the mortgage-deed was to secure to the mortgagee the payment of the produce agreed upon, and though the penalty for non-payment specifically mentioned is that the defaulting mortgagor is to lose possession, we see no reason why the mortgagee should not, if so advised, waive his right to possession, and sue to recover the value of the produce to which he was entitled under the bond. We cannot therefore accede to the appellant's contention that the decree of 5th February 1898 was a wrong decree as not being warranted by the terms of the mortgage-deed.

As regards the argument that the payment of produce by defendants, endorsed by their own admission, between the date of the decree of 1898 and the year 1907 operates to give plaintiff a right to sue for possession on the original mortgage-deed of 1893. The defendants certainly made the statement now relied upon by the appellant in his plea, and Mr. A. defendant, repeated it when examined in Court. There is no other proof of such payments. The plaintiff did not admit receipt of produce for these years, and merely said that he looked upon items of produce for certain years, of which the recovery was barred by limitation, as having been paid so far as he was concerned. This is a somewhat slender foundation upon which to build the ingenious argument put forward before us by counsel for the appellant.

However, assuming for the moment that defendants did pay produce to plaintiff between 1898 and 1897, can it be said that the defendants thereby waived their right to plead order II, rule 2, in bar of the plaintiff's present claim? Or was there any tacit renewal of the contract of mortgage a breach of which might give the plaintiff a fresh cause of action? As regards the first question, the dictum of the learned Judges who decided 19 P. R. 1910 (*Chaudri Kulan Lal v. Sardar Allah Dad Khan*) (1) appears to us to expound the law correctly: "we cannot assent to the proposition that it is open to the parties *inter se* to override the rule laid down by the legislature in regard to splitting of causes of action," p. 409 of the report.

It is further clear that at the time of the suit in 1897-98 the plaintiff's cause of action for assumption of possession and for recovery of accrued interest was one and the same, *viz.*, the defendant's failure to pay produce due at that time under the covenant. In a case decided by the Chief Court of Lower Burma, Civil suit No. 10 of 1909, reported as *Dubash Kader v. Fukeer Meeru* (2), Bell, J., held that the addition of the new clause (c) to order 2, rule 4 of the Code of Civil Procedure, has materially altered the law as it stood in section 44, rule (a) of the last Code. The argument is that the clause (c) to the present rule 4 in order 2 shows by implication that claims coming under (a) and (b) of the rule are not claims based on the same cause of action as that on which the suit for recovery of movable property is based, because otherwise, clause (c) would be superfluous. We are unable, however, to accept this view. It appears to us that the new clause (c) has been inserted in order to avoid the possibility of mistake and to make it perfectly clear that there is nothing irregular in seeking to recover in one suit immovable and movable property if the cause of action is the same in both. As pointed out in 28 P. R. 1907 (*Ganga Ram v. Abdul Rahman*) (3), the Code nowhere defines the term "cause of action," and it is therefore not probable that the legislature in enacting clause (c) of rule 4, order 2, intended to distinguish the claims mentioned in clauses (a) and (b) of rule 4 as being causes of action distinct in nature from the class of claim dealt with in clause (c).

As to the appellant's contention, that the payment of produce by way of interest after the suit of 1897-98, tacitly

(1) 19 P. R. 1910.

(2) (1909) 8 Indian Cases 445.

(3) 28 P. R. 1907.

created a new contract of mortgage and thereby gave the plaintiff on breach of its terms a fresh cause of action, counsel has referred us to a remark of Johnstone, J. in *Malik Karim v. Jattu Ram*; case No 1178 of 1909. The facts were similar to those in the present case, but the defendant had made no payment of interest subsequent to decree as is alleged to have been the case here. The remark in question is as follows :—
“ Had defendant after the first decree began to pay *kasur*, it might have been argued that there was a new tacit contract of “ mortgage.” This is an *obiter dictum* of the learned Judge and does not even decide that in the case propounded a fresh contract of mortgage should be presumed. Section 62 of the Contract Act lays down that, if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. But the party who relies on the new contract must prove that it was supported by consideration ; a mere promise by a creditor made at the request of his debtor to forbear from suing him is regarded as a voluntary promise and is therefore of no effect. *Trimbak v. Bhagwan Das* (1).

In the present case we have at most an admission by the defendant that he paid produce after the original contract had for all practical purposes determined in his favour by the mortgagee's failure to enforce his right to possession thereunder in the suit of 1897-98. And that admission was made, not in reply to a suit brought specifically on the new contract now put forward, but as a plea in bar of a claim made upon the original contract. Certainly the defendants never contemplated that any such results would flow from their admission as are embodied in the ingenious argument put forward on behalf of the plaintiff-appellant. It is by no means certain that the fact now put forward by the plaintiff-appellant is true. If true, he fails in any event upon part of his original claim, *etc.*, for the value of the produce of the harvests of *Kharif* 1907 and *Rabi* 1908. It hardly lies in his mouth now to say in this Court that part of his claim is false, and to put that forward as an argument in furtherance of his other claim for possession. Cases may arise in which the claim of a mortgagee to possession becomes barred under order 11, rule 2, and a fresh legal contract may be inferred from the action of the parties even if not formally embodied in a fresh deed of mortgage, but the present case is not one of them. There is no sufficient proof of any such

novation as is claimed by the plaintiff-appellant to have taken place.

The appeal, therefore, fails and is hereby dismissed with costs.

Appeal dismissed.

No. 5.

Before Hon. Mr. Justice Rattigan and Hon.

Mr. Justice Scott-Smith.

**YAKUB KHAN AND OTHERS—(DEFENDANTS)—
APPELLANTS**

Versus

**FATEH KHAN AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.**

Civil Appeal No. 1259 of 1910.

Custom—alienation—Awans of Attock tahsil—alienation by sonless proprietor not permissible in presence of collaterals.

Held, that among Awans of Attock tahsil a sonless proprietor is not competent under the customary law to alienate the whole of his property by will in the presence of his first cousins without their consent.

15 P. R. 1907 (*Amir Ali v. Baggo*) (1), 79 P. R. 1896 (*Bakhsha v. Mir Baz*) (2), 49 P. R. 1898 (*Aulia v. Ali*) (3), 9 P. R. 1899 (*Sher Muhammad v. Phula*) (4), 8 P. R. 1906 (*Khuda Yar v. Fattch*) (5), and 46 P. R. 1900 (*Nura v. Tora*) (6), referred to.

Further appeal from the decree of E. A. Estcourt, Esquire, Divisional Judge, Attock Division, dated the 12th November 1910.

Muhammad Shafi for appellants.

Pestonji Dadabhai and Bhagat Ram Puri for respondents.

The judgment of the Court was delivered by—

SCOTT-SMITH, J.—The parties to this case are Awans of the Attock tahsil and the property in dispute is that of Fazl Iahi, a sonless proprietor, who died on the 20th May 1907. On the 15th May 1907, *i.e.*, five days prior to his death, he made a will under which he bequeathed 333 kanals out of a total of 805 kanals owned by him to Yakub Khan, defendant, his sister's son, whom he described as his son-in-law. He went on to state in the will that he owed debts, which he specified, amounting to Rs. 2,000, and said that $\frac{1}{2}$ of the remaining land was to go to his reversioners on condition that they paid these debts, but if they did not pay them then Sikandar Khan and Jafar Khan

21st May 1913.

(1) 15 P. R. 1907.

(2) 79 P. R. 1896.

(3) 49 P. R. 1898.

(4) 9 P. R. 1899.

(5) 8 P. R. 1906.

(6) 46 P. R. 1900.

were to have the land and pay the debts. The other half, he said, was for the maintenance of his mother and his two wives, and that, when his mother died, Rs. 100 were to be spent on her funeral ceremonies, and similarly Rs. 300 were to be spent on the funeral ceremonies of each of his wives. The reversioners were to incur these expenses and to get the land after the death of the women. If they did not defray these expenses they would have no right to the land and then it was to go to Sikander Khan and Jafar Khan aforesaid. The plaintiffs, who are the first cousins of the deceased, brought this suit for a declaration to the effect that the will should not affect their reversionary rights after the death or remarriage of the three women already referred to. The first Court relying chiefly upon No. 15 *P. R.* 1907 (*Amir Ali v. Baggo*) (1), held that the will, which it described as being in respect of a portion only of the property of Fazl Iahi in favour of his son-in-law, was valid according to custom, and therefore, dismissed the plaintiffs' claim. The lower Appellate Court held that it was not proved that Yakub Khan was the son-in-law of Fazl Iahi, but only that he had been betrothed to the latter's daughter. It, therefore, distinguished No. 15 *P. R.* 1907 which held that a bequest of ancestral property in favour of a daughter in the presence of a brother was valid, and held that the defendants had not discharged the burden of proof which lay on them. It accordingly accepted the appeal and gave the plaintiffs the declaratory decree prayed for.

The defendants have filed a further appeal to this Court.

In Robertson's Customary Law of the Rawalpindi District, prepared in 1887, we find question 37 at page 16 to be as follows :—

“ Can a proprietor make a disposition of his property to take effect after his death and is there any rule limiting such power ? ”

The answer to this question given by the Awans was that “ a man can leave his property by testamentary disposition made with full possession of his faculties in presence of trustworthy witnesses.” Upon this the compiler remarks that “ such a disposition against the rights of near relatives of the whole estate, however, would undoubtedly be disputed.” Question 38 at page 17 is as follows :—

“ Can a testamentary disposition of property be made only with the consent of the heirs, or contrary to their wishes ? ”

To this the Awans replied, "a man can make a testamentary disposition of property without the consent of his heirs." The learned compiler, however, was quite certain that, if a case were to arise, the heirs would not agree to this view, if a large share of the property were so treated. It is to be noted that no instances are given in which an Awan made a bequest of the whole of his property without the consent of his heirs. At the time when this manual of Customary Law was compiled the Attock *tahsil* formed part of the Rawalpindi District. The present Attock District was constituted in 1905, and Mr. Kitchin, the Settlement Officer, compiled a Manual of Customary Law thereof during the recent settlement and it was published in 1911. At page 35 of this book we find questions 37 and 38 as follows :—

"Can a proprietor make a disposition of his property to take effect after his death, and is there any rule limiting such power ?"

"Can a will be made without the consent and in defiance of the wishes of the heirs ?"

The answers to these questions are as follows :—

"It is admitted by all that a will made with the consent of the heirs in favour of some other person will hold good and it is scarcely likely that any dispute will arise in such a case....." The compiler also remarks that the custom is, however, vague as to whether a man has a right to dispose of the whole or a part of his property by will according to his own inclinations and without the consent of the rightful heirs." He says that "it may be safely assumed that a reasonable disposition of property by will for a worthy object..... would have the sanction of custom, while any attempt to tamper with the legal right of the direct heirs to the property would be strongly disapproved of by public opinion." Question 40 at page 38 is as follows :—

"Can a proprietor, having no male issue, make a gift or not ?"

The answer generally given to this question was that a proprietor in such circumstances has no power of gift and all the tribes agree to this statement of the custom. The author remarks that "the custom, however, is not as stated as is amply proved by the examples given....." His view is that "it would be more correct to state that a proprietor without sons may dispose only of a reasonable portion of his land by gift in the presence of collateral heirs, and has full power to gift his property to whom he will if there be none but very distant collaterals to inherit." We are of opinion,

therefore, that the answers to these questions do not shew that a sonless proprietor has unrestricted power to make a gift or bequest of the whole of his ancestral property without the consent of near reversioners whereas in the present case they exist. We note that under the answers to questions 37 and 38 three instances are given amongst Awans where wills were set aside at the instance of the collaterals after the death of the testator. On the other hand, no instances are given of cases in which an unrestricted power of alienation by will was upheld.

With reference to the question of fact, whether a valid marriage had actually taken place between Yakub Khan and the daughter of Fazl Hahi, we are disposed to agree with the lower Appellate Court. We think that it was, no doubt, Fazl Hahi's intention to marry his daughter to Yakub Khan, but she was only three years old at the time of his death, and it is exceedingly improbable that any marriage of a child of that age had actually taken place. The evidence as to the actual marriage is very meagre and we consider it to be insufficient. The documentary evidence of instances put in by the defendants has been discussed in his judgment by the learned Divisional Judge. He has shewn that the instances are not really on all fours with the present case. On the other hand, the plaintiffs cited the case of *Lal v. Mussammal Fazl Nishan*, decided by the Divisional Judge of the Rawalpindi Division in Appeal No. 148 of 1901 on the 7th June 1901, in which it was held that there was no custom by which a childless Awan proprietor could alienate his property to his sister's son in the presence of collaterals. This decision was upheld by this Court by order, dated the 28th February 1902, in Civil Appeal No. 132 of 1902. Mr. Shafi, for the appellants, has referred us to a number of reported cases of this Court, but with the exception of 15 P. R. 1907 (*Amir Ali v. Baggo*) (1) these all come from other districts.

In Shahpur, no doubt, it has been held that an Awan proprietor has very wide powers of alienation:—See 79 P. R. 1896 (*Bakhsu v. Mir Baz*) (2), 49 P. R. 1898 (*Aulia v. Alu*) (3) and 9 P. R. 1899 (*Sher Muhammad v. Phala*) (4). In Jhelum also it has been held that gifts in favour of a stepson and a daughter's son are valid, see 8 P. R. 1906 (*Khuda Yar v. Fatteh*) (5) and 46 P. R. 1900 (*Nura v. Tora*) (6).

15 P. R. 1907 (*Amir Ali v. Baggo*) (1), is no doubt, from the Rawalpindi District, but the parties to that case were of the

(1) 15 P. R. 1907.

(2) 79 P. R. 1896.

(3) 49 P. R. 1898.

(4) 9 P. R. 1899.

(5) 8 P. R. 1906.

(6) 46 P. R. 1900.

Rawalpindi *tahsil*, and it does not follow that the custom in the Attock *tahsil* is the same. Moreover, that was a case of a bequest of property to a daughter. In the present case the bequest is not to a daughter but to a sister's son and, though, no doubt, the testator intended to make him his son-in-law, the whole will shews that the intention was to benefit the legatee, and not the daughter or her issue at all. We, therefore, do not consider that this ruling helps the defendants very much. What we gather from Robertson's Customary Law of the Rawalpindi District and Kitchin's Customary Law of the Attock District is that a gift or a will disposing of only a reasonable portion of the testator's property would be valid by custom and would not be objected to by the reversioners. We cannot find any authority for the proposition that an alienation by will or gift of the whole of the property in the presence and in defiance of near collaterals would be valid. It has been argued by Mr. Shafi that the present will is only in respect of a portion of the testator's property, and that Yakub Khan has only been left a little more than one-third of the property. We are, however, unable to regard the will in that light. It really disposes of the whole of the property of the testator. It leaves nearly $\frac{1}{2}$ of the ancestral land free of encumbrance to Yakub Khan. It then goes on to leave half of the remaining property to the reversioners on condition that they pay off debts, amounting to Rs. 2,000, and declares that, if they do not fulfil this condition, the land would go to some one else. As regards the other half, it lays down that the reversioners would only get it after the women's rights have come to an end and if they spend certain sums, amounting in all to Rs. 1,000, upon their funeral ceremonies. These are very onerous conditions and, if held to be valid, would undoubtedly be productive of much litigation hereafter between the reversioners and Sikandar Khan and Jafar Khan who are to get the land if the reversioners fail to comply with the testator's conditions as to the payment of debts, etc. It appears to us probable that Fazl Ilahi wished to benefit Sikandar Khan and Jafar Khan, and on his being doubtful of his power to leave them his land directly he adopted this roundabout manner of doing so. He has, in our opinion, arrogated to himself for more power than custom allows.

We are, therefore, quite unable to hold on the authorities cited that such a will is valid. Had the testator made a bequest of a reasonable portion of his estate to Yakub Khan, we might have been disposed to uphold it, but the will as actually framed is certainly not valid by custom and must

be set aside as a whole. We cannot alter its provisions and say that one part is valid and another invalid. We, therefore, uphold the order of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

No. 6.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Scott-Smith.

MAGHI—(PLAINTIFF)—APPELLANT

Versus

NARAIN AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 511 of 1911.

Pre-emption—indivisible transaction—vendees cannot shew by parol evidence that transaction divisible—stare decisis.

Certain land was sold to five persons for a consideration of Rs. 1,000, and the deed stated that the sale was to the first four vendees as regards four shares and to the fifth vendee as regards the remaining fifth share. In a suit for pre-emption of the whole property the transaction being treated as indivisible the vendor sought to adduce parol evidence to shew the sale was a divisible one—

Held, that persons who by clothing their transaction in a particular form, have induced a pre-emptor to come forward and claim pre-emption in respect of the transaction as a whole, cannot be allowed to turn round thereafter and claim to shew that their real intention was something quite different.

Held, also on the principle of *stare decisis*, following:—

94 P. R. 1895 (*Mura v. Mine Khan* (1)), 66 P. R. 1896 (*Kasar Singh v. Punjab Singh*) (2), 48 P. R. 1907 (*Achhra v. Labhu*) (3), and *Khoti Ram v. Mauj Din* (4) and dissenting from *Ram Nath v. Badri Narain* (5):

That where the purchase-money for a sale is paid in a lump sum without specification of the amounts paid by the various vendees, the transaction must be regarded as indivisible, though the shares to be taken by the various vendees may have been specified in the deed.

Further appeal from the decree of H. A. Rose, Esquire, Additional Divisional Judge, Ambala Division, at Ludhiana, dated 3rd February 1911.

Santanam, for appellant.

Kanwar Narain, for respondents.

(1) 94 P. R. 1895.

(3) 48 P. R. 1907.

(2) 66 P. R. 1896.

(4) (1912) 16 Indian Cases 979.

(5) (1896) I. L. R. 19 All. 148.

The judgment of the Court was delivered by—

RATTIGAN, J.—Plaintiff sued for pre-emption in respect of 28th May 1913.
certain land sold by Mussammat Manglo for a consideration of Rs. 1,000 to the five defendants-vendees. According to the deed of sale the purchase money was paid in a lump sum, but it was stated that the sale was to the first four vendees as regards four shares and to the fifth vendee, as regards the remaining fifth share. Admittedly plaintiff has a right of pre-emption superior to that of the fifth vendee Kirpa Ram, and he claims to pre-empt the whole of the property on the ground that the transaction was one and indivisible, and that the first four vendees whose rights are equal to his own have lost their rights by joining with themselves a person who has no right of pre-emption as against the plaintiff. The first Court granted plaintiff a decree for pre-emption of the whole land on payment of the sum of Rs. 1,000 as specified in the sale-deed. The Additional Divisional Judge held that it was open to the vendees to shew that the transaction was really of a two-fold character and comprised—

- (a) a sale of four-fifths of the property to the first four vendees and
- (b) a sale of one-fifth thereof to Kirpa Ram.

He accordingly modified the first Court's decree by giving plaintiff a decree for pre-emption in respect of a one-fifth undivided share of the land on payment of Rs. 200. The plaintiff preferred a further appeal to this Court and the matter came in the first instance before Chevis, J., as a Single Bench. The learned Judge was of opinion that certain rulings of this Court referred to in his order were not altogether consistent as regards the principle to be applied in cases of this kind and that a ruling of the Full Bench of the Allahabad High Court, *Ram Nath v. Badri Narain* (1) was in direct conflict with No. 66 P. R. 1896 (*Kasur Singh v. Punjab Singh*) (2). He accordingly referred the case to the Division Bench.

We have been carefully through the authorities cited in the referring order and are unable to see any conflict between them. The principle hitherto accepted by this Court is that a sale transaction is to be regarded as indivisible in those cases where the purchase-money is paid in a lump sum without specification of the amounts paid by the various vendees, and that the mere fact that the shares to be taken by the vendees

(1) (1896) I. L. R. 19 All. 148.

(2) 66 P. R. 1896.

respectively are specified in the sale-deed, does not alter the nature of the transaction and is at most an arrangement among the purchasers *inter se* which does not affect the vendor (see 94 P. R. 1895 (*Murad v. Mian Khan*) (1), 66 P. R. 1896 (*Kasar Singh v. Punjab Singh*) (2), 48 P. R. 1907 (*Achhru v. Labhu*) (3) and *Khota Ram v. Manj Din* (4)). The case is, however, different where there is a specification not only of the shares to be taken by the vendees, but also of the amounts to be respectively paid by the latter. In such a case the Court is justified in holding that the transaction is of a divisible character (see 6 P. R. 1909 (*Brij Lal v. Massan*) (5)). The Full Bench of the Allahabad High Court has, no doubt, laid down a different principle and the ruling of that Court above cited is in direct conflict with No. 66 P. R. 1896 (*Kasar Singh v. Punjab Singh*) (2) and other authorities of this Court. The ruling in question was brought directly to the notice of a Division Bench of this Court in 48 P. R. 1907 (*Achhru v. Labhu*) (3) and also in *Khota Ram v. Manj Din* (4), but in both cases the learned Judges refused to follow it. In these circumstances acting upon the principle of *stare decisis*, we hold, in accordance with the authorities of this Court, that in the present case the sale must, upon the true construction of the terms of the sale-deed, be held indivisible.

It was next urged that the vendees were entitled to show by oral evidence that the sale was in fact one of a two-fold character, and that the transaction, so far as defendants Nos. 2 to 5 were concerned, was entirely distinct from the transaction in favour of defendant No. 6. It may be a question whether evidence of this kind is admissible, regard being had to the provisions of section 99 of the Indian Evidence Act, but however that may be, we are clear that persons who by clothing their transaction in a particular form have induced a pre-emptor to come forward and claim pre-emption in respect of that transaction as a whole cannot be allowed to turn round thereafter and to claim to shew that their real intention was something quite different from that expressed in the sale-deed. It was quite open to the vendees to insist on the sales being effected by two different deeds, or, at all events, to take care to make it clear by reference to the amount of purchase-money payable by them respectively that the transaction was not of an indivisible character.

(1) 94 P. R. 1895.

(2) 66 P. R. 1896.

(3) 48 P. R. 1907.

(4) (1912) 16 Indian Cases 979.

(5) 6 P. R. 1909.

We accordingly accept the appeal and setting, aside the decree of the lower Appellate Court, we grant plaintiff a decree for pre-emption of the whole land in suit on payment of Rs. 1,000 into Court within one month from this date. It is alleged that plaintiff has already made a deposit of a certain amount into Court and, if this is the case, the amount of such deposit will of course be taken into consideration. In default of payment within the aforesaid period plaintiff's suit to stand dismissed with costs throughout. If, however, the decree of this Court is complied with, plaintiff will get his costs in the lower Courts and also in this Court.

Appeal accepted.

No. 7.

Before Hon. Mr. A. Kensington, Officiating Chief Judge.

PHUMAN SHAH—(PLAINTIFF)—PETITIONER

Versus

CHHANGA—(DEFENDANT)—RESPONDENT.

Civil Reference No. 73 of 1912.

Land Alienation Act, section 21 A (2)—limitation of two months cannot be extended.

Held, that the period of two months within which an application should be made by a Deputy Commissioner under section 21 A (2) of the Alienation of Land Act, 1900, cannot be extended by the Court to which the application is made.

Held also, that it is extremely doubtful whether section 21 A (2), Alienation of Land Act, applies to a decree passed under section 9, Specific Relief Act, where no question of title is decided.

Case referred by Major A. C. Elliott, Deputy Commissioner, Gurdaspur, with his No. 1320, dated the 11th July 1912.

Nemo, for petitioner.

Nemo, for respondent.

The judgment of the learned Judge was as follows:—

KENSINGTON, J.—This is an application to the Chief Court 18th June 1913. professing to be made under section 21 A (2), Land Administration Manual.

Section 21, Land Administration Manual, has no bearing on the matter, and apparently the reference should be to the Land Alienation Act.

The Civil Court decree in question was one for possession under section 9, Specific Relief Act. It was passed on the 9th June 1911.

I think it extremely doubtful whether a decree of the kind, which settles no question of title, can be revised under

section 21 A (2), Land Alienation Act, but however that may be, the Deputy Commissioner's application must be refused as not having been made within the prescribed period of two months from the date on which he was informed of the decree.

The decree was brought to the Deputy Commissioner's notice by an English report from the Tahsildar, dated 16th November 1911. The Deputy Commissioner merely recorded on this a vernacular order, dated 25th November 1911, that the case should be brought up at the Sadr.

Eventually application was (erroneously) made to the Divisional Judge, Amritsar, by letter No. 292, dated 23rd February 1912. The Divisional Judge returned the application on the 24th June 1912 as being beyond his jurisdiction. The present reference was then made to the Chief Court on the 11th July 1912.

Even if allowance is made for the whole of the period taken up with the erroneous reference to the Divisional Judge, it is clear that the prescribed period of two months had long expired when application was made to him on the 23rd February 1912.

It is not open to the Chief Court to extend the time for applications of the kind in any way. The record will accordingly be returned without orders, the application being refused.

Application refused.

No. 8.

Before Hon. Mr. Justice Agnew and Hon. Mr. Justice Shadi Lal.

FILLINGHAM—PETITIONER

Versus

DUNN—RESPONDENT.

Civil Reference No. 10 of 1913.

Civil Procedure Code, 1908, section 113—reference to Chief Court—reasonable doubt—interest—Act XXXII of 1839.

Held, that a reference can only be made when the Court making the reference entertains a reasonable doubt, and when the Chief Court has already decided the point of law involved, in a published judgment, it cannot be said that any reasonable doubt exists as to that point of law.

Held also, following 55 P. R. 1901 (*Edulji v. McDonald*, 1), and 104 P. R. 1901 (*Bura v. Maila Shai*, 2), that in the absence of a contract to pay interest, it can only be allowed when demand has previously been made in accordance with the provisions of Act XXXII of 1839.

(*Bhanaji Raoji Katoji v. Joseph De Brito*) (3).

(1) 55 P. R. 1901.

(2) 104 P. R. 1901.

(3) (1905) I. L. R. 30 Bom. 226.

Case referred by Iala Diwan Chand, Judge, Small Cause Court, Lahore, through Major A. A. Irvine, Divisional Judge of the Lahore Division, with his No. 273 of 10th March 1913.

Nemo, for petitioner.

Nemo, for respondent.

The judgment of the Court was delivered by—

SHADI LAL, J.—This is a reference under section 113 of the Civil Procedure Code by the Judge of the Small Cause Court, Lahore, on a point of law which is already covered by the authorities of this Court. Under order XLVI, rule 1, a reference can only be made when the Court making the reference entertains a reasonable doubt, and it cannot be said that a Subordinate Court entertains a reasonable doubt on a question of law which has been decided by the highest Court of the Province, unless the authority of the decision can be questioned by virtue of a judgment of the Privy Council, *vide Bhanaji Raoji Khoji v. Joseph De Brito* (1). It is the duty of the Subordinate Courts in this Province to follow the decisions of the Chief Court and leave the aggrieved party to move this Court, if so advised, to reconsider its view. The point involved in this reference has been decided in 55 P. R. 1901 (*Edulji v. McDonald*) (2) and 104 P. R. 1901 (*Bura v. Mailia Shah*) (3). The former judgment is an authority for the proposition that interest is not allowed upon the unpaid price of goods sold and delivered, unless the demand is made in accordance with the provisions of Act XXXII of 1839, and that a printed head line in a tradesman's bill to the effect that interest would be charged after a stated period of credit is not a demand of interest within the statute. The observations of the learned Chief Judge at page 176 which have been quoted by the referring Judge in his order as the reason for making this reference do not, in our opinion, mean that when there is no contract to pay interest and when the conditions of Act XXXII 1839 are not fulfilled, interest can be allowed on the ground that the debtor had delayed the payment of the debt due by him. They were intended to meet the argument of the plaintiff in that case that, in spite of demand having been made as required by the Interest Act, the lower Court had not allowed interest and suggested the ground for refusing to exercise its discretion to award interest conferred upon the Court by the Act.

20th June 1913.

(1) (1905) I. L. R. 30 Bom. 226.

(3) 104 P. R. 1901.

(2) 55 P. R. 1901.

In 104 P. R. 1901 (*Bura v. Mailia Shah*) (1), Robertson and Harris, JJ., decided that interest cannot be allowed as damages under section 73 of the Indian Contract Act.

As both the points are covered by the authorities of this Court, we think that the learned Judge was not competent to make this reference. The case will be returned to the lower Court with the foregoing reply.

No. 9.

Before Hon. Mr. Justice Agnew and Hon. Mr. Justice Shadi Lal.

MUHAMMAD ALI AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

JAMITA AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 329 of 1912.

Custom—adoption—Awans of Sathowal, Sialkot District—adoption of a daughter's son is valid—Riwaj-i-am.

Held, that the adoption of a daughter's son is valid by the custom governing Gurrae Awans of the Sialkot District.

Further appeal from the decree of Rai Bahadur Lala Chuni Lal, Divisional Judge, Sialkot Division, dated the 22nd August 1911.

Nabi Bakhsh, for appellants.

Nihal Chand, for respondents.

The judgment of the Court was delivered by—

24th June 1913.

SHADI LAL, J.—The facts of this case are very simple. Jamita, a Gurrae Awan of manza Sathowal, tahsil Zaffarwal, District Sialkot, adopted Ismail, his daughter's son. The plaintiffs, who are collaterals of Jamita in the third degree, have filed the present suit for a declaration that the adoption will not affect their reversionary rights. Both the Courts have dismissed the suit having found in favour of the factum and validity of the adoption and the plaintiffs have moved the Chief Court by petition for revision, admitted as an appeal under section 70 (1) (b) of the Punjab Courts Act.

The question of custom is the only point before us. On behalf of the plaintiffs Mr. Nabi Bakhsh has contended that the *onus* of proving the custom lay upon the adopted son, and that it has not been discharged. The learned Pleader cited para. 37 (b) of Rattigan's Digest of Customary Law in support of the proposition that the general presumption is against the validity of the adoption of a daughter's son among agriculturists. He also relied upon the entry in the *Riwaj-i-am* which is given at page 22 of the Customary Law of the Sialkot District and is against the adoption of a daughter's son in the presence of the collaterals up to the third degree.

We are of opinion that the *onus* is, to start with, upon the defendants to prove the validity of the adoption, but we hold that it has been fully discharged. There are three judgments of the Divisional Court, Sialkot, in favour of the custom, and, though in the case decided by Mr. Macauliffe on the 20th March 1889 the collaterals were related in the 7th degree, we think the cumulative effect of these important documents is decidedly in support of the contention put forward on behalf of the adopted son. In the judgment of Mr. D. C. Johnstone, as Divisional Judge, dated the 16th October 1903, there is a full discussion of the rights of daughters and their sons in this tribe and the analogy between gifts and adoption is pointed out. There was in that case an exhaustive inquiry into custom and several judicial precedents were produced in support of gift to daughters and daughters' sons and of the adoption of the latter. In 1908 Mr. Malan, as the Divisional Judge, Sialkot, decided on the strength of judicial instances that an Awan was entitled to adopt his daughter's son and dismissed the suit of the plaintiffs who were related in the third and fourth degree. As against this evidence the plaintiffs have not produced a single instance in which a Court negatived the adoption of a daughter's son among Awans of this district. Two witnesses vaguely referred to two cases, but copies of judgments were not produced in support of their allegations.

The *Riwaj-i-am* contains an entry of a general character applicable to all the tribes and is not supported by instances. We cannot, therefore, attach much importance to it, more especially when we find that in some of the reported judgments of this Court the *Riwaj-i-am* of the district has not been followed. In 23 P. R. 1877 (*Ranjha v. Mussamat Rahim Bibi*) (1),

the Chief Court found, notwithstanding the entry in the *Rivaj-i-am* to the contrary, that custom allowed an Awan of the Sialkot District to make a gift of his land in the presence of collaterals. In 20 P. R. 1886 (*Shah Muhammad v. Hasham*) (1), the validity of the adoption of a daughter's son among Arains of Sialkot in the presence of a brother's son was upheld, though the entry in the *Rivaj-i-am* was against such adoption. In a recent ruling reported as No. 27 P. R. 1912 (*Shahab-ud-Din v. Mussammat Barkati*) (2) the Hon'ble Mr. Justice Johnstone held that, contrary to the *Rivaj-i-am* of 1898, it had been proved that among Salabriya Rajputs of *Mauza Parel, Tahsil Zaffarwal*, District Sialkot, the rule of succession was *chundawand* and not *pagwand*. The learned Pleader for the plaintiffs has cited judgments of this Court relating to Jats of Sialkot which we consider are inapplicable to the present case. We specially asked the Pleaders of the parties whether they knew of any case of this Court in which the question of the adoption of a daughter's son among Awans of the Sialkot District had come up for discussion and they informed us that they had not been able to find one.

We notice that there are reported cases of Awans of other districts which throw some light upon the question before us. In 26 P. R. 1901 (*Ali Muhammad v. Dulla*) (3) a bequest in favour of a daughter's son, an Awan of the Shalpur District, was held valid in the presence of brothers. As regards Awans of the Rawalpindi *Tahsil*, No. 15 P. R. 1907 (*Amir Ali v. Baggo*) (4), lays down that a bequest of ancestral property by a sonless proprietor in favour of his daughter is valid in the presence of his brothers. It must not be forgotten that the Awans are an endogamous tribe and would therefore favour the rights of daughters and their sons.

For these reasons we hold, in concurrence with the lower Courts, that the adoption of Ismail by Jamita is valid according to the custom obtaining in the tribe, and that the plaintiffs' suit must fail. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 20 P. R. 1886.

(2) 27 P. R. 1912.

(3) 26 P. R. 1901.

(4) 15 P. R. 1907.

No. 10.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Shah Din.*

SHAM PARSHAD— (JUDGMENT-DEBTOR)—APPELLANT

Versus

RAM CHAND AND ANOTHER— (DEBT-HOLDERS)—
RESPONDENTS.

Civil Appeal No 569 of 1910.

*Civil Procedure Code, Act V of 1908, sections 144, 151—restitution—right
of appeal.*

R. C. and R. S. obtained an *ex parte* decree against S. P. and others for Rs. 5,627 on 20th June 1904 from the Court of the District Judge, Delhi. This was eventually set aside by the Chief Court as against S. P. on the 16th May 1906. The suit as against S. P. was finally dismissed by the first Court on 8th December 1906, and this decree was upheld by the Chief Court on 31st October 1907. Meanwhile, R. C. and R. S. took out execution of their *ex parte* decree of 20th June 1904 and the share of S. P. in a village in the Gurgaon District was sold on 28th May 1906 and purchased by A. S., a minor. The sale was confirmed on 9th July 1906 and R. C. and R. S. withdrew Rs. 2,714-12-0 out of the purchase money deposited in Court. A. S. got possession of the property purchased in June 1907. In April 1908 S. P. sued R. C., R. S. and A. S. for possession of his share in the Gurgaon property and the Divisional Court gave him a decree on 26th March 1909, conditional on his depositing Rs. 2,714-12-0 for payment to A. S. S. P. paid this sum and got possession. On 4th October 1909 S. P. applied to the Court at Delhi for restitution of the Rs. 2,714-12-0 from R. C. and R. S., but the suit was dismissed on the ground that section 144, Civil Procedure Code, under which the application had been made, did not apply. On appeal to the Chief Court—

Held, that section 144, Civil Procedure Code, had no application and no appeal lay. The only restitution to which S. P. was entitled was restitution of his share in the Gurgaon property and he had already obtained possession of this.

Held also, that as the order of the District Judge, Delhi, was not on the face of it perverse or illegal the Chief Court would not on revision interfere with his order under section 151, Civil Procedure Code.

*Miscellaneous first appeal from the decree of J. Addison, Esquire,
District Judge, Delhi, dated the 28th February 1910.*

Sheo Narain for appellant.

Pestonji Dadabhai for respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—The facts of this case are briefly these :— 25th June 1913.

On the 18th April 1904 Ram Chand and Ram Singh brought a suit in the Court of the District Judge, Delhi, for recovery of Rs. 5,627 against Indar, Sham Parshad and Shao Shankar,

and on the 20th June 1904 the District Judge decreed the claim in full *ex parte* against the defendants. Sham Parshad, defendant, applied to have the *ex parte* decree set aside. His application was rejected by the District Judge on the 15th July 1904; but on appeal this Court set aside the *ex parte* decree by order, dated the 16th May 1906, and directed the District Judge to proceed with the case in accordance with law. On the merits, the suit was dismissed by the District Judge as against Sham Parshad on the 8th December 1906, and the decree of the District Judge was upheld by this Court on the 31st October 1907.

Meanwhile, the decree-holders took out execution of the *ex parte* decree of the 20th June 1904. The judgment-debtors were mortgagees of a village called Alapur in the Gurgaon District, and on an application of the decree-holders the decree was transferred for execution to the Court of the District Judge, Gurgaon. On the 5th December 1904 an application was made by the decree-holders in the said Court for attachment of the mortgage rights of the judgment-debtors in the aforesaid village; but as the shares of two of the judgment-debtors, Indar and Shao Parshad, had already been sold in execution of another decree, the rights of Sham Parshad alone were sold by auction on the 28th May 1906 and were purchased by one Ahmad Shafi, minor. The sale was confirmed on the 9th July 1906, and on the 30th August 1906 the decree-holders withdrew Rs. 2,714-12-0 out of the purchase money deposited in Court by the auction-purchaser. The auction-purchaser applied for and obtained possession of the share of Sham Parshad in *Mauza* Alapur in June 1907. As has been stated above, the suit of Ram Chand and Ram Singh had been dismissed on the merits by the Delhi Court against Sham Parshad on the 8th December 1906, and on appeal the decree of the Delhi Court was confirmed by this Court in October 1907. In April 1908 Sham Parshad instituted a suit in the Court of the District Judge Gurgaon, against Ram Chand and Ram Singh, decree-holders, and Ahmad Shafi, auction-purchaser, for recovery of possession of his one-third share in *Mauza* Alapur in the Gurgaon District as mortgagee. The District Judge dismissed the suit; but on appeal the Additional Divisional Judge, Delhi, by order, dated the 26th March 1909, passed a decree in favour of Sham Parshad for possession of the share claimed, conditional on his depositing in Court Rs. 2,714-12-0 for payment to the auction-purchaser Ahmad Shafi, and further directed the decree holders, Ram Chand and

Ram Singh, to pay the costs of Sham Parshad throughout. Sham Parshad deposited the money for payment to the auction-purchaser and obtained from the latter possession of his one-third share of village Alapur.

On the 7th April 1909 Sham Parshad applied under section 144, Civil Procedure Code, in the Court of the District Judge, Gurgaon, for restitution of Rs. 2,714-12-0 from the decree-holders, Ram Chand and Ram Singh; but this application was returned by the District Judge for presentation in the proper Court, on the ground that he had no jurisdiction to entertain the application under section 144 aforesaid. On the 4th October 1909 the same application was presented by Sham Parshad in the Court of the District Judge, Delhi, but that Court dismissed it by order, dated the 28th February 1910, on the ground, *inter alia*, that since the applicant Sham Parshad had already obtained restitution of his property which had been sold in execution of the *ex parte* decree of the 20th June 1904, his application for recovery of Rs. 2,714-12-0 from the decree-holders was in effect one for cancellation of the condition which was laid down in the decree passed in his favour by the Additional Divisional Judge, Delhi, on the 26th March 1909 and was not covered by the terms of section 144, Civil Procedure Code.

From the order of the District Judge Sham Parshad has appealed to this Court. A preliminary objection has been raised by the learned counsel for the respondents that since Sham Parshad's application for restitution does not fall within the scope of section 144 of the Code of Civil Procedure, the order passed thereon by the District Judge does not amount to a decree, and that therefore no appeal lies to this Court from the said order. We think that this objection is well founded and must prevail. It is clear to our minds that the only restitution to which the appellant was entitled under section 144 aforesaid was restitution of his one-third share in *Mauza* Alapur in the Gurgaon District, which had been sold in execution of the *ex parte* decree of June 1904; that restitution was made to him by the decree of the Additional Divisional Judge, dated the 26th March 1909, and in accordance with that decree, he has actually obtained possession of the said share. The fact that the decree of the 26th March 1909 was a conditional one under which the appellant was obliged to pay Rs. 2,714-12-0 to the auction-purchaser, Ahmad Shafi, before obtaining from him possession of his one-third share in the said village does not entitle him to apply under section 144 of

the Code of Civil Procedure for recovery of the said sum of Rs. 2,714-12-0 from the decree-holders Ram Chand and Ram Singh, who were also parties to the decree of the 26th March 1909 and who clearly and admittedly are not in possession of any property belonging to the appellant Sham Parshad.

The learned Advocate for the appellant, recognising the force of this argument, at last conceded that his client's application in the Court below was not covered by the terms of section 144 of the Code, and that the order of the District Judge did not amount to a decree such as would be appealable to this Court. He, however, contended that under section 151, Civil Procedure Code, the District Judge had inherent power to order the decree-holders, who are respondents before us, to refund for the benefit of his client the sum of Rs. 2,714-12-0, which they had withdrawn out of the purchase money deposited by the auction-purchaser, Ahmad Shafi. in the Court of the District Judge, Gurgaon, inasmuch as in withdrawing that amount the decree-holders (who knew at the time that the *ex parte* decree of the 20th June 1904, in execution of which Sham Parshad's property had been sold, had been set aside) had abused the process of the Court and it was necessary for the ends of justice to compel them to repay into Court the money which they had improperly withdrawn without having any title thereto. The learned Advocate urged that since the District Judge could have exercised his inherent power under section 151 in favour of his client, he ought to have done so; and that this Court should deal with the order of the District Judge on the revision side and pass such orders as it thinks fit under the peculiar circumstances of the case.

We are not prepared to accept this argument. The case is doubtless a hard one; but the District Judge with all the facts before him did not see his way to exercise the discretionary power vested in him by section 151 of the Code of Civil Procedure and we certainly do not think that we should be justified in exercising our revisional jurisdiction under section 70 of the Punjab Courts Act so as to interfere with the order of the District Judge which, on the face of it, is not a perverse or illegal order.

We hold that no appeal lies to this Court from the order of the Court below, and we decline to interfere with it on the revision side. The appeal is accordingly dismissed; but under all the circumstances of the case, we think that the parties should pay their own costs in this Court and we direct accordingly.

Appeal dismissed.

No. 11.

*Before Hon. Mr. Justice Beadon and Hon. Mr.
Justice Scott-Smith.*

MIRAN BAKHSH AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

NATHU—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 34 of 1912.

*Custom—alienation—ancestral land—gift to one heir to exclusion of
others—Arains—Hoshiarpur district.*

Held, that by custom among Arains of the Hoshiarpur district, a childless proprietor has no power to make a gift of his ancestral property to one reversionary heir to the exclusion of the others.

*Further appeal from the decree of H. A. Rose, Esquire, I.C.S.,
Divisional Judge, Ludhiana Division, dated the 9th October
1911.*

Muhammad Shafi for appellants.

Sheo Narain for respondent.

The judgment of the court was delivered by—

BEADON, J.—The land and houses in dispute are the 30th June 1913.
ancestral property of Bura, who was defendant No. 1 in this suit,
but died while the suit was pending. The *plaintiffs* are the
descendants of Bura's brothers, Sawan and Saudagar, and
Nathu, defendant, is the son of Bura's third brother Shadi.
Thus, under the pedigree-table, the plaintiffs are Bura's rever-
sionary heirs to the extent of $\frac{2}{3}$ rd share and Nathu, defendant, is
Bura's reversionary heirs to the extent of $\frac{1}{3}$ rd share. The parties
are Arains of the Hoshiarpur district.

Bura's daughter, Mussammat Fatima, who died about twelve
years before the suit, was married to Nathu, defendant, and
by him had a son, Rahmatullah, who died in 1907.

Bura made a gift of his property to his daughter's son,
Rahmatullah, but the property again reverted to Bura on
Rahmatullah's death in 1907.

In June 1908 Bura made a gift of the property to Nathu
by registered deed in consequence of which the plaintiffs
brought the present suit to have it declared that this gift will
not affect their reversionary rights. The first Court decreed
the claim, but the lower Appellate Court has dismissed the
suit.

Bura did not die till some time after the gift; he appeared
before the Sub-Registrar and personally got the deed

registered and, in the absence of Nathu, who is a police constable serving in the Jullundur district, he caused mutation to be effected in Nathu's favour. Thus, though Bura was an old man and as a defendant repudiated the gift in Court, it is obvious that the gift was voluntarily made and, though Bura retained the management of the property on behalf of the absent donee, formal possession passed to the donee at mutation.

A gift to a son-in-law, which is intended to benefit the donor's daughter and her children, is sometimes allowed by custom, but the gift now in dispute is not one of this kind because, at the time of the gift, the *donor's daughter* and her only child were both dead. In fact counsel for the defendant has not contended before us that the gift is valid by reason of the fact that the donee is the donor's son-in-law. Thus the point for decision is, whether, among Arains of the Hoshiarpur district, there can be a gift to one reversionary heir to the exclusion of the others.

According to mutation entries on the record one Alladya made a gift to his nephew in 1862 and one Umra made a gift to his nephew in 1885. There is however no evidence to show the circumstances under which these gifts were made and they are not of much value as instances of custom.

In a decision by the Subordinate Judge of Jullundur, dated 28th April 1886, relating to Arains, a gift to a nephew was upheld, but in that case the donee had lived for 20 years since his infancy with the donor as an adopted son.

A decision by the District Judge of Jullundur, dated 15th November 1905, has also been referred to, but here again the donee was an adopted son.

Lastly, in a case decided by the District Judge of Jullundur on 4th April 1906 and relating to Arains a gift to a nephew in return for services rendered was upheld.

In the present case it is contended that the gift is valid by reason of services rendered to Bura by Nathu but, assuming that such services would make a gift valid by custom, we are unable to agree with the lower Appellate Court that any services have been proved. Nathu on one occasion appears to have sent a money order for Rs. 30, but it is not apparent for what purpose this money was sent, and this petty remittance is certainly not adequate consideration for the transfer to him of the whole of Bura's estate. Nathu has been serving in the police. He has not lived with Bura and has not assisted

Bura in the management of his affairs or the cultivation of his land. He has married another wife by whom he has children and, in fact, he refused to leave the police and to go and live with Bura at his village.

Under these circumstances, we are unable to hold that the gift is binding on the plaintiffs and, accepting the appeal and reversing the lower Appellate Court's decree, we restore the decree of the first Court allowing the plaintiffs costs throughout.

Appeal accepted.

No. 12.

*Before Hon. Mr. Justice Shah Din and Hon.
Mr. Justice Scott Smith.*

RAM DAS AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

MEHAR DAD AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No 969 of 1910.

Res judicata—Civil Procedure Code, Act XIV of 1882, section 13—first suit for possession by redemption—second suit for possession.

The land in suit was first mortgaged for Rs. 180. Subsequently in 1889 it was mortgaged again to three persons, *viz.*, N., K. and H. (N. having four shares while the remaining two had two and one share respectively). These three mortgagees instituted a suit for possession by redemption against the previous mortgagee and the representatives of the mortgagors. This suit was finally decreed in 1893, by which plaintiffs were to obtain possession on payment of Rs. 403 to the previous mortgagee. This decree was never executed.

The present plaintiffs, the sons of N., now brought another suit for possession of their $\frac{1}{4}$ th share against the same parties alleging that they paid off the previous mortgagee out of Court within twelve years of suit. It was proved that the mortgagors had all along remained in possession of the mortgaged land.

Held, that the previous suit, *quâ* the mortgagors, was one for possession similar to the one now brought and, as both suits were based upon the same cause of action, the present suit was barred by the rule of *res judicata* under section 13 of the old Code of Civil Procedure.

Further appeal from the decree of P.D. Agnew, Esquire, Divisional Judge, Gujranwala Division, at Lahore, dated the 7th April 1910.

Nanak Chand, for appellants.

Badr-ud-Din and Umar Bakhsh, for respondents.

The judgment of the Court was delivered by—

27th June 1913.

SHAH DIN, J.—The facts of this case are fully and clearly stated in the judgments of the Courts below and it is unnecessary to recapitulate them here. The two questions discussed before us in this appeal are the same as are discussed in the judgment of the learned Divisional Judge ; namely, (1) whether the plaintiffs' suit was barred by limitation ; and (2) whether the suit was barred by section 13 of the old Code of Civil Procedure (1882). On the first question the learned Divisional Judge held that the suit was within time, on the ground that the cause of action upon which the present suit is based accrued to the plaintiffs when they paid the mortgage money, Rs. 403, to the prior mortgagee, Devi Ditta, in 1897 and the latter gave up possession of the land in suit. According to the Divisional Judge, this took place within twelve years before the date of the present suit, and therefore he has held that the suit is within time. Upon the second question, the learned Divisional Judge does not decide the point whether the suit is barred by the rule of *res judicata* or not, but he holds that the principle underlying section 47 of the new Code of Civil Procedure (corresponding with section 244 of the old Code of Civil Procedure) applies to this case and that on that ground the suit is not maintainable. He has accordingly dismissed the plaintiffs' suit, thus maintaining the decree of the Munsif who also had dismissed the suit, though he rested his decision on the ground that the suit was barred by section 11 of the new Code of Civil Procedure.

We may say at once that we do not agree with the learned Divisional Judge that section 47 of the new Civil Procedure Code or the principle underlying it applies to this case. There is no question here of the plaintiffs seeking any relief against the defendants such as can be said to be connected with the execution, discharge or satisfaction of the decree of October 1893, and, therefore, section 47, Civil Procedure Code, has no bearing on the plaintiffs' claim. We must, therefore, leave section 47 out of account.

Coming now to the question whether the suit is barred by the rule of *res judicata* or not, we think that this question must be answered in the affirmative. The parties to the present suit between whom there is a contest as to the possession of the land in dispute were parties to the suit of 1893. The last-mentioned suit, which was brought by the father of the present plaintiffs, together with his co-mortgagees, Mula and Hakim, was a suit for redemption against the prior

mortgagee, Jhanda Mal (whose rights devolved by reason of a private partition upon his brother Devi Ditta, defendant No. 8 in this case), but, so far as regards the original mortgagors or their heirs, who were also implicated as defendants, along with the prior mortgagee, the suit was one for possession of the mortgaged land pure and simple. The mortgagors were not merely *pro forma* defendants, as it appears from the record that they contested the claim of the prior mortgagee that he was entitled to receive from the subsequent mortgagees a larger amount of money than was entered in the mortgage-deed of 1889; and, as a result of the litigation, the Divisional Judge granted to the then plaintiffs, (*i.e.*, the father of the present plaintiffs and his co-mortgagees) on the 30th October 1893 a decree for redemption on payment of Rs. 403 to the prior mortgagee Devi Ditta, present defendant No. 8, and a decree for possession of the mortgaged land against the mortgagors, who are the contesting defendants in this litigation. Admittedly, the decree of October 1893 was never executed; no money was paid by the present plaintiffs' father to the prior mortgagee in satisfaction of the redemption decree, nor was possession of the land taken from the present defendants, the mortgagors, in execution of the decree against them. It is said that the plaintiffs' father paid his share of the mortgage money, Rs. 403, to Devi Ditta in August 1897, and that Devi Ditta gave up possession of the land in 1898 or thereabouts; but on this point there is no evidence at all on the record, the date of the alleged payment being only mentioned both by the plaintiffs and by Devi Ditta in their plaint and in his written statement, respectively.

The question for decision is, whether the present plaintiffs' father having obtained a decree for possession of the land in suit in 1893 against the present defendants and having omitted to obtain possession in execution thereof, it is now competent to the plaintiffs to bring a second suit for possession of the same land against the defendants. It is urged by the plaintiffs' counsel that the suit of 1893 was simply one brought against the prior mortgagee for redemption of the mortgage, and not one for the possession of the land, pure and simple, as against the mortgagors; and that the present suit being one for possession only against the mortgagors is not barred by the rule of *res judicata*. But this argument overlooks the fact that in 1893 the mortgagors were in possession of the land, and that they were impleaded as defendants in the suit brought by the present plaintiffs' father and his co-mortgagees because of

their being so in possession ; and it is, therefore, clear that although, *quâ* the prior mortgagee, the suit was one for redemption of the prior mortgage, *quâ* the mortgagors, it was one for possession of the land, and the decree of the Divisional Court was binding on the mortgagors as well as on the prior mortgagee. In execution of that decree the present plaintiffs' father could and should have obtained possession of the land on payment of the mortgage money fixed by the Court not only from the prior mortgagee, but also from the mortgagors who were in actual cultivating possession of it. He omitted to execute the decree and obtain possession in execution ; it is stated that he paid his share of the mortgage money to the prior mortgagee out of Court in 1897 ; and thereafter in the year 1908 his sons brought the present suit for possession of the land against the mortgagors. It seems clear to us that, so far as the mortgagors are concerned, the present suit, based as it is on exactly the same cause of action as the suit of 1893, was barred by the rule of *res judicata* under section 13 of the old Code of Civil Procedure. We have referred to the plaint in the present suit, and the plaintiffs have not alleged therein any fresh cause of action against the defendants such as would make the doctrine of *res judicata* inapplicable to this case.

As regards the question, whether the suit is within limitation or not, there is no evidence on the record to prove that the plaintiffs paid Devi Ditta their share of the mortgage money in August 1897 ; a mere allegation of this fact in the plaint and in the written statement of Devi Ditta, unsupported by sworn testimony in Court, is insufficient to show that the money was paid, as alleged in 1897 so as to bring the suit within limitation. In our opinion it is highly probable that Devi Ditta received the money very soon after the decree for redemption was passed in 1893, and it seems to us that the alleged payment of the money in 1897 has been set up in order to bring the present claim within time. We, therefore, hold that it is not proved that the suit of the plaintiffs was instituted within the period of limitation and on this ground also the suit was liable to be dismissed.

For the reasons given, we maintain the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

No. 13.

Before Hon. Mr. Justice Agnew and Hon.
Mr. Justice Shadi Lal.

SHAHANCHI KHAN AND OTHERS—(DEFENDANTS)—
APPELLANTS

Versus

MUSSAMMAT BEGAM JAN AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 776 of 1911.

Custom—succession—ancestral land—gift to son-in-law, who died leaving a grand-daughter as his only descendant—claim by donor's collaterals—Khattars of tahsil Fatteh Jang, district Attock.

Held, that the rule regulating succession to property gifted to a son-in-law is that there must be failure of all female as well as male heirs in the donee's line before the collaterals of the donor can come in to claim the inheritance.

12 P. R. 1892 (F. B.) (*Sita Ram v. Raja Ram*) (1), 84 P. R. 1909 (*Gurdit Singh v. Mussammat Prem Kaur*) (2), 96 P. R. 1909 (*Mussammat Allah Rakhi v. Zakar Hussain*) (3), 102 P. R. 1909 (*Kalu v. Mussammat Kako*) (4), 5 P. R. 1910 (*Ilahi Bakhsh v. Mussammat Budhi*) (5), 68 P. R. 1911 (*Lachman v. Bhagwan Sahai*) (6), 76 P. R. 1912 (*Mussammat Chandi v. Thulla Singh*) (7) and Civil Appeal 1061 of 1909 (unpublished) referred to.

32 P. R. 1895 (F. B.) (*Lehna v. Mussammat Thakri*) (8), 129 P. R. 1893 (*Muhammad v. Mussammat Umar Bibi*) (9), 14 P. R. 1907 (*Sharfo v. Ramzan*) (10), 104 P. R. 1907 (*Imam Din v. Mulla*) (11), 112 P. R. 1900 (*Fatteh Ali v. Abdullah*) (12), and 39 P. R. 1905 (*Nawab Khan v. Kallu Khan*) (13), distinguished.

First appeal from the decree of Lala Pohn Ram, District Judge, Attock District, at Campbellpur, dated the 17th May 1911.

Pestonji Dadabhai, for appellants.

Muhammad Shafi, for respondents.

The judgment of the Court was delivered by—

AGNEW, J.—The suit is for possession of 5,599 kanals, 18 30th June 1913.
marlas of land by the plaintiff, Mussammat Begam Jan, against numerous defendants whose relationship to the plaintiff may be seen from the pedigree-table given in the judgment of the

(1) 12 P. R. 1892 (F. B.).

(2) 84 P. R. 1909.

(3) 96 P. R. 1909.

(4) 102 P. R. 1909.

(5) 5 P. R. 1910.

(6) 68 P. R. 1911.

(7) 76 P. R. 1912.

(8) 32 P. R. 1895 (F. B.).

(9) 129 P. R. 1893.

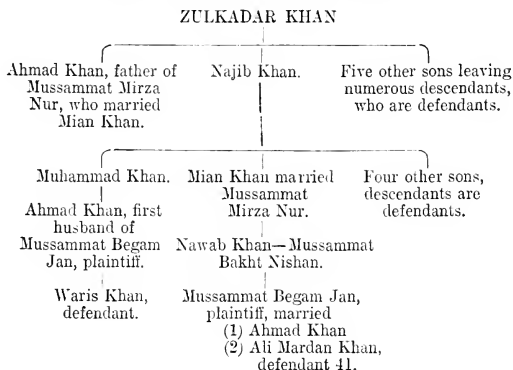
(10) 14 P. R. 1907.

(11) 104 P. R. 1907.

(12) 112 P. R. 1900.

(13) 39 P. R. 1905.

lower Court. For the purpose of the present appeal the following abbreviated pedigree-table is sufficient :—



The facts are not disputed and are as follows :—

About 1854 Ahmad Khan gifted his whole estate to his son-in-law Mian Khan. In 1869 mutation was carried out in favour of Mian Khan with the approval of Ahmad Khan's brothers.

Mian Khan had by Mussammat Mirza Nur a son, Nawab Khan, who died about 1893 leaving a widow and a minor daughter, the plaintiff. Mutation was carried out in favour of Mussammat Mirza Nur, the mother of Nawab Khan, and of his widow, Mussammat Bakht Nishan, half and half.

Two years after, in 1895, Mussammat Bakht Nishan died and mutation of her share was carried out in favour of the plaintiff who was her daughter and was then unmarried.

About 1900 Mussammat Begam Jan, plaintiff, married Ahmad Khan, son of Muhammad Khan, and mutation of her share was then carried out in favour of her grandmother, Mussammat Mirza Nur. She had a son, Waris Khan, by Ahmad Khan, but the latter died in 1904. In 1906 Mussammat Begam Jan re-married Ali Mardan Khan, defendant No. 41.

In 1907 Mussammat Mirza Nur died and plaintiff claims the entire estate originally owned by Ahmad Khan, son of Zulkadar Khan, on the strength of a custom prevailing in the Khattar tribe since she married in the family and never left her father's house. It is also claimed by her that 498 *kanals*, 10 *marlas* of the land in suit was the self-acquired property of her grandfather Mian Khan. This claim is not disputed in this Court and

there is no doubt that the plaintiff is entitled to the possession of that land. The plaintiff's claim is also based on a second ground, *viz.*, that the gift made by Ahmad Khan, son of Zulkadar Khan, was intended for the benefit of his daughter Mussammat Mirza Nur and her issue, male or female. Hence the plaintiff is the heir by Customary Law.

The lower Court found that the plaintiff had proved her claim on both grounds and granted a decree for possession as prayed. In this Court we have not heard argument on the point of custom by which Mussammat Begam Jan claims to succeed under the tribal custom to the exclusion of the defendant-collaterals, here appellants, since, in our opinion, the appeal can be decided on the strength of the second ground of claim put forward by the plaintiff-respondent. The question for decision is, whether the collaterals of the donor succeed in preference to a female descendant of the donee. Put in this form we cannot but hold that numerous rulings of this Court supply a clear and unequivocal answer in favour of the plaintiff's contention.

The Full Bench ruling, 12 P. R. 1892 (*Sita Ram v. Raja Ram*) (1), laid down that the collaterals of the donee in a case such as the one here propounded are excluded by the collaterals of the donor on failure of the donee's line. Up to the Full Bench decision of 1892 such a gift of ancestral property was regarded as an absolute transfer; and after the decision the collateral heirs of the donee were excluded and on failure of the donee's line the property was to revert to the collaterals of the donor; see page 62 of the report. The subsequent course of decision has undoubtedly been that there must be failure of *all female* as well as *male* heirs in the donee's line before the collaterals of the donor can come in to claim the inheritance. See 84 P. R. 1909 (*Gurdit Singh v. Mussammat Prem Kaur*) (2), 96 P. R. 1909 (*Mussammat Allah Rakhi v. Zakar Hussain*) (3), 102 P. R. 1909 (*Kalu v. Mussammat Kako*) (4), 5 P. R. 1910 (*Ilahi Bakhsh v. Mussammat Budhi*) (5), 68 P. R. 1911 (*Lachman v. Bhagwan Sahai*) (6), 76 P. R. 1912 (*Mussammat Ghendi v. Thulla Singh*) (7), and, finally, a very recent ruling of a Division Bench of this Court, *Kamma v. Samand Khan*, Civil Appeal No. 1061 of 1909, decided on 1st June 1912. In this view then there can be no question but that the plaintiff would exclude the defendants.

(1) 12 P. R. 1892 (F.B.).

(2) 84 P. R. 1909.

(3) 96 P. R. 1909.

(4) 102 P. R. 1909.

(5) 5 P. R. 1910.

(6) 68 P. R. 1911.

(7) 76 P. R. 1912.

The argument of the learned counsel for the defendants-appellants may be briefly summarized as follows :—

In the first place he urges that the gift to a daughter or her husband when assented to by collaterals of the donor is to be regarded as a final transaction. Future successions to the land so gifted are to be governed by the ordinary rules of inheritance under which a daughter of the donee or his son *may* be an heir, but that is a matter for inquiry and proof of a particular tribal custom governing such devolutions. And, since the ordinary rule of a Customary Law is that daughters are excluded by near male collaterals, he claims that the burden of proof is on the plaintiff to prove that she is entitled to exclude the defendants-collaterals of the donor.

Secondly, he points to the somewhat peculiar series of successions to this property after the death of the donee, Mian Khan, which are summarized in the first portion of this judgment. The conclusion which the learned counsel wished us to draw from these successions was not very clear; but we think his meaning was that in these successions the property was not treated as gifted heritable property and that, when the whole property concentrated in the hands of Mussammat Mirza Nur and then fell into possession on her recent death, it should be looked upon as the absolute property of Mussammat Mirza Nur. Since then, a granddaughter, such as the plaintiff is not, under Customary Law, necessarily the heir of her grandmother in the presence of collaterals of the latter's father, it is again for plaintiff to prove her right to succeed in preference to the defendants-collaterals.

The answer to this argument is two-fold. In the first place whatever the rights of Mussammat Begam Jan might be as a daughter, heir of her father Nawab Khan, in competition with his collaterals or even in competition with the larger circle of collaterals descending from the common ancestor, Zulkadar Khan, we are not in this appeal to decide any such question at all. The decisions of this Court spoken of above make it quite clear that there must be complete failure of male and female heirs of the donee's line before the collaterals of the donor or even of the last male proprietors can come in at all.

Secondly, the mutations which followed the death of Nawab Khan in 1893 and of his wife Bakht Bari in 1895, also the marriage of Mussammat Begam Jan in 1900 are all capable of being explained by circumstances of family respect for an elder or of family convenience. So long as Mussammat Mirza

Nur was alive, the collaterals of her father could have nothing and were not concerned with the internal distribution of the estate among the female members of the donee's family. We do not therefore think that the distribution of the estate in question can be taken as indicating that it was being treated in any special way culminating in an estate vesting in Mussamat Mirza Nur to which defendants may claim to succeed as collaterals of her father.

For appellants, 32 *P. R.* 1895 (*F. B.*) (*Lehna v. Mussamat Thakri*) (1), has been cited. That ruling lays down that property such as that in suit which has passed into the possession of a female heir does not lose its character of ancestral property. But this does not affect the question whether female heirs of the donee must also be extinct before succession opens to the collaterals of the donor. On such extinction the donor's collaterals are no doubt ordinarily the heirs. But even in this ruling, see page 136 of the report, it is said that the collaterals of the donor would only succeed in default of the lineal heirs of the donee, thus including female as well as male heirs.

With regard to 129 *P. R.* 1893 (*Muhammad v. Mussamat Umar Bibi*) (2), that ruling proceeds very much on the interpretation of an entry in a particular *Ri'aj-i-am*, and a later ruling of equal authority, 5 *P. R.* 1910 (*Ilahi Bakhsh v. Mussamat Budhi*) (3), lays down that where daughters have succeeded their fathers as heirs, their daughters are entitled to succeed to the mother's estate in the absence of direct male heirs. We cannot find that the ruling cited helps the appellants in any way.

The ruling 14 *P. R.* 1907 (*Sharfo v. Ramzan*) (3) has been put forward by appellants' learned counsel as strengthening the position which he takes up, that after the death of the original donee succession goes by the ordinary rule of Customary Law. But there is no doubt that where a daughter is recognized as a fit donee of ancestral estate she is virtually looked upon as a son in the sense that she having passed on the estate to a son, that son is treated as if he had inherited through males—104 *P. R.* 1907 (*Imam Din v. Mulla*) (5).

That, however, while it is an indisputable proposition of Customary Law which would have weight were we considering

(1) 32 *P. R.* 1895 (*F. B.*).(2) 129 *P. R.* 1893.(5) 104 *P. R.* 1907.(3) 5 *P. R.* 1910.(4) 14 *P. R.* 1907.

[the question of tribal custom in this case, does not affect the present question the answer to which is concluded by the rulings of this Court cited above and ending with Civil Appeal No. 1061 of 1909 (judgment of 1st June 1912).

The ruling 112 P. R. 1900 (*Fatteh Ali v. Abdullah*) (1), also cited by appellant, has no bearing on the present case. There is here no contest between the collaterals of the donor as a body and the collaterals of the donee.

On the other hand, 39 P. R. 1905 (*Nawab Khan v. Kallu Khan*) (2) is an authority directly against Mr. Pestonji's position in this appeal. There, a woman whose husband had received from her father a gift of land for her benefit was permitted to gift the same land to her own daughter on the same principle, although there were near collaterals of the mother's husband in existence and they objected. It is clear, then, that the ordinary rules of inheritance did not operate in this case after the termination of the interest of the original donee.

We are quite clear, then, that in the presence of Mussammat Begam Jan the plaintiff, the defendants-collaterals of the original donor Ahmad Khan, have no right to hold possession of the land in suit. The whole argument of the learned counsel for appellants is an attempt to show that the rulings of successive Division Benches of this Court have gone too far and that, if the doctrine, that female heirs in the donee's line must be exhausted before the collaterals can come in, be pushed to its logical conclusion, the practical effect will often be that the ultimate rights of the collaterals of the donor will be a mere barren right and the elementary principle of tribal law upon which the Full Bench decision of 1892 proceeds will be set at naught. No doubt, to take an example, if Mussammat Begam Jan had married a person outside the circle of collaterals and had a son by him the effect might be to transfer to a stranger and his family land to which the ultimate right would ordinarily reside in the collaterals of the donor. But such a case, though it might arise, would be very rare, and ordinarily these gifts to a daughter's husband are favoured among endogamous tribes, such as the Khattars, and the effect is merely to substitute for male descendants of the alienor, descendants to him through his daughter who is looked upon as a conduit to pass the estate to her children in substitution for ordinary male descendants of the donor. There is thus no real hardship to the donor's

collaterals involved. They are in the same position as they would have been had the donor had male heirs capable of inheriting. The tribe being endogamous the doctrine does not operate to introduce strangers into the original proprietary body.

For these reasons we affirm the finding of the lower Court on the third issue and dismiss the appeal with costs.

Appeal dismissed.

No. 14.

Before Hon. Mr. Justice Beadon and Hon.

Mr. Justice Scott-Smith.

ABDULLAH SHAH—(PLAINTIFF)—APPELLANT

Versus

HUSSAIN JAHANIA SHAH AND OTHERS—(DEFENDANTS)
—RESPONDENTS.

Civil Appeal No. 97 of 1912.

Punjab Pre-emption Act, II of 1905, section 16—nature of application for issue of a notice—validity of notice, not signed by the applicant or the presiding officer of the Court.

Held, that it is not essential before a notice is issued under section 16 of the Punjab Pre-emption Act that there should have been negotiations with any particular individual for the sale of the property and no limit is provided either as regards the time within which negotiations are to be completed after the issue of notice or as regards the number of persons who can be approached with a view to negotiating the sale.

Held, further that a notice, issued under section 16 of the Punjab Pre-emption Act which is signed by the official authorised to sign and issue processes under the orders of the Court and bears the seal of the Court is not bad because it is not signed by the person at whose instance it is issued or by the presiding officer of the Court.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Multan Division, dated 20th November 1911.

Muhammad Shafi and Shah Nawaz, for appellant.

Sheo Narain, for respondents.

The judgment of the Court was delivered by—

BEADON, J.—The house in dispute was the joint property of Barkhurdar and his nephews. On 28th February 1909 Barkhurdar alone presented an application to the District Judge to the effect that he wished to sell the house, that there were persons ready to pay Rs. 3,200 for the house, and that he wished notice to issue to Abdullah Shah (the present 2nd July 1913.

plaintiff), that if he wished to exercise his right of pre-emption, he could do so at the price of Rs. 3,200.

A notice in terms of this application was duly issued from the Court of the District Judge under the signature of the Clerk of Court and the seal of the Court. This notice was admittedly served on the plaintiff, but the plaintiff took no action of any kind on it.

It appears that no one had in fact offered as much as Rs. 3,200 for the house and some eight months later, after certain negotiations with one Allah Wasaya had taken place, Barkhurdar arranged to sell the house to the chief defendant for Rs. 2,500. This sale was duly completed by a registered deed executed by all the co-sharers.

The plaintiff then instituted the present suit for pre-emption, but the lower Courts have dismissed the suit on the ground that the plaintiff's right of pre-emption has become extinguished under section 17 of the Pre-emption Act (Punjab Act II of 1905).

It has been contended that the notice issued to plaintiff was in respect of a proposed sale for Rs. 3,200; that there was a subsequent proposal to sell to Allah Wasaya; and the sale in dispute was the result of a third proposal to sell after an interval of eight months; that even if a valid notice was issued under section 16 of the Act in respect of the first proposal to sell, no such notice was issued in respect of the sale in dispute; that plaintiff, though wishing to enforce his right of pre-emption at a reasonable price, took no action on the notice because he was not prepared to enforce his right against a purchaser for so large a sum as Rs. 3,200; and that the words "any person" and "vendor" in sections 16 and 17 include all the co-sharers in the property to be sold and consequently a notice issued by one of the co-sharers alone is not a valid notice.

We do not think that there is much force in these contentions.

The law of pre-emption, by conferring a special right on pre-emptors, not only restricts the ordinary right of the owners of property to dispose of it as they please, but also restricts the ordinary right of others to purchase property which comes into the market; and the obvious intention of sections 16 and 17 is to provide a means by which it can be ascertained by these persons whether or not the pre-emptor intends to waive his right. It is not essential that there should have been negoti-

ations with any particular individual or individuals before the notice is issued, and no limit is provided either as regards the time within which negotiations are to be completed after the issue of notice, or as regards the number of persons who can be approached with a view to negotiating the sale.

No definite contract takes place in proceedings under these two sections and after issuing the notice, the owner of the property, if he cannot get the price mentioned in his notice, can sell at a lower price or need not sell at all. Similarly a pre-emptor who receives notice issued under section 16 is not bound by the price mentioned in the notice, and, if he in turn gives notice under section 17 of his intention to enforce his right of pre-emption and of the price he is prepared to pay, he is not finally bound by that notice but, in the event of a sale to a third party, he can abandon his claim, at the price which purports to have been paid, or if he thinks that there is ground for getting the price reduced, he can claim at a lower price.

It does not appear to be essential that the notice under section 16 should give minute details of title, but all that is essential is that the pre-emptor should have notice that certain specified property is for sale, and that it is expected that a certain specified price will be obtained by the sale.

In the present case Barkhurdar was the co-sharer managing the property; he had no reason to suppose that the other co-sharers who live at a distance would not ratify his negotiations; they did as a fact ratify his negotiations by joining in the sale; and, if they had not ratified the negotiations, no sale would have taken place and there could have been no infringement of plaintiff's right of pre-emption.

The question, whether or not there were persons ready to buy at Rs. 3,200, is a point which was not material in proceedings under sections 16 and 17, and the notice left the plaintiff under no misapprehension either in regard to the property which it was proposed to sell or as regards the price it was expected to obtain. It was an easy thing for the plaintiff to keep his right alive in the manner provided by section 17 and we can find no adequate excuse for his not having done so.

It has been further contended that, as the notice was not signed either by Barkhurdar or by the District Judge, the plaintiff has in fact received no legal notice. Section 16, however, does not provide that the notice must be signed by the person at whose instance it is issued, nor that the notice must be

signed by the presiding officer of the Court. A notice issued by the Court on an application is obviously a notice by the applicant issued through the Court, and we can see no valid reason for rejecting a notice which bears the seal of the Court and the signature of the officer of the Court to whom has been allotted the duty of signing and issuing processes issued under the orders of the Court.

We agree with the lower Courts in the finding that plaintiff's right of pre-emption has become extinguished and we dismiss the appeal with costs.

Appeal dismissed.

— — —
No. 15.

Before Hon. Mr. Justice Agnew and Hon.

Mr. Justice Shadi Lal,

MANOHAR—(DEFENDANT)—APPELLANT

Versus

DULA AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 234 of 1911.

Punjab Tenancy Act, XVI of 1887, section 59—succession to occupancy tenancy by illegitimate son.

Held, that an illegitimate son of a Chambar Rajput of the Hoshiarpur district is not entitled to succeed to his father's occupancy rights under section 59 of the Punjab Tenancy Act, as he is not a male lineal descendant of his father within the meaning of that section.

65 P. R. 1911 (*Har Dial v. Kali Ram*) (1) and *Ram Kali v. Jamma* (2), referred to.

Further appeal from the decree of J. P. Thompson, Esquire, Divisional Judge, Hoshiarpur Division, at Hoshiarpur, dated the 12th August 1910.

Santanam for appellant.

Sunder Das for respondents.

The judgment of the Court was delivered by—

3rd July 1913.

SHADI LAL, J.—The point of law on which this appeal was admitted to a Division Bench is, whether the appellant, who is an illegitimate son of the deceased Devia, a Chambar Rajput of the Hoshiarpur district, is entitled to succeed to the latter's occupancy tenancy as his "male lineal descendant" under section 59 of the Punjab Tenancy Act. Mr. Santanam for the appellant wanted to argue that Devia, though nominally a

Rajput, was not really so, and relied upon the observations at page 255 of No. 65 *P. R.* 1911 (*Har Dial v. Kale Ram*) (1) in support of the contention that many tribes, though they called themselves Rajputs, did not really belong to that caste. The learned counsel added that, Devia not being a Rajput, the male offspring of his union with a Brahmin woman, was, according to custom, entitled to succeed to his property. This point has been urged for the first time here and has never been taken at any previous stage of this case. The provisions of section 70 (1) (b), Punjab Courts Act, preclude us from going into any question, except the one upon which the petition for revision has been admitted as a further appeal. We therefore intimated to the counsel that the question, whether Devia was or was not a Rajput, was not properly before us and could not be argued.

As regards the question of law which has been referred to us for decision Mr. Santanam frankly stated that he was not prepared to argue that an illegitimate son of a Rajput could come within the definition of the words "male lineal descendant" as used in the Punjab Tenancy Act. It is now settled beyond dispute that according to Hindu Law an illegitimate son of a Sudra by a continuous concubine is entitled to inherit the property of his putative father (*Inderun v. Ramasawmy*) (2). It was for this reason that the High Court of Allahabad in *Ben Kali v. Jamma* (3), decided that the illegitimate son of a Sudra by a kept woman was a male lineal descendant within the meaning of section 22 of the Agra Tenancy Act of 1901. But this reasoning has no application to the twice-born classes amongst whom an illegitimate son is not an heir of his natural father either under Hindu Law (*vide Chhoturya v. Sahub Purhuland*) (4), or under the Customary Law, (*vide Rattigan's Digest of Customary Law*, paragraph 34).

The rules of succession, as laid down in section 59 of the Punjab Tenancy Act, are much more restricted in their scope than those of Hindu, Muhammadan, or Customary Law and we cannot hold that an illegitimate person, who has no rights of inheritance under the ordinary law of succession, is included in the category of male lineal descendants for the purpose of succession to occupancy rights in land. We are not aware that there is any authority, none has been quoted to us, that a person who is not recognized

(1) 65 *P. R.* 1911.(2) (1869) 13 *Moo. I. Ap.* 141 (159).(3) (1908) *I. L. R.* 30 *All.* 508.(4) (1857) 7 *Moo. I. Ap.* 18.

as an heir in matters of succession to property in general, has a better status under the Tenancy Act for the purpose of succeeding to occupancy rights. His claim to succession to those rights does not receive any support either from the plain grammatical meaning of the words used in the Tenancy Act or from any principles of law with which we are acquainted.

We accordingly hold that the appellant is not a male lineal descendant of Devia and has no right to succeed to his occupancy tenancy. His appeal must therefore fail and is dismissed with costs.

Appeal dismissed.

No. 16.

*Before Hon. Mr. Justice Agnew and Hon.
Mr. Justice Shadi Lal.*

HAKIKAT RAI—(PLAINTIFF)—APPELLANT

Versus

**RAM SARAN DAS AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.**

Civil Appeal No. 512 of 1911.

*Custom—alienation—Hindu law—alienation of ancestral land—Khatri
of Mauza Khairabad, Jullundur district.*

Held, that it had not been proved that Khatri traders of Mauza Khairabad, Jullundur district, were governed by agricultural custom in the matter of alienation of ancestral land, and that the mere fact that they had owned the land in dispute for six or seven generations did not create a presumption in favour of their being governed by custom.

1 P. R. 1910 (*Mussammat Maya v. Gurdit Singh*) (1), 59 P. R. 1908 (*Lachman Das v. Pahla Mal*) (2), 88 P. R. 1910 (*Dhera Singh v. Tara Singh*) (3), and 43 P. R. 1911 (*Harnam Singh v. Mussammat Harderi*) (4), referred to.

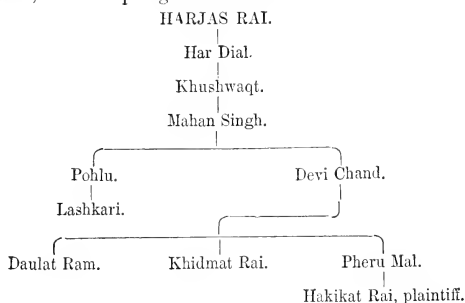
*Further appeal from the decree of J. H. Leslie Jones, Esquire,
Divisional Judge, Jullundur Division, dated the 24th February
1911.*

Dalip Singh for appellant.

Salamat Rai for respondents.

The judgment of the Court was delivered by
AGNEW, J.—The pedigree-table is as follows:—

3rd July 1913.



The suit was for declaration that a mortgage of 334 *kimals* of land for Rs. 4,800, executed by Pheru Mal, father of plaintiff, on 9th February 1909, in favour of Ram Saran Das, should not affect the plaintiff's right after the death of his father.

The points for decision are—

- (1). Whether the parties are governed by Hindu Law or by agricultural custom in matters of alienation?
- (2). Whether the mortgage was for consideration and necessity?

As regards the first question the lower appellate Court found that in *Sikh* times Harjas Rai acquired 250 acres of land in *Mauza Sheikhpura*, which was, during the settlement of 1881, separated off into the "*be Chiragh*" estate of *Khairabad*; that the descendants of Harjas Rai had never followed agriculture as a practical pursuit, but had adopted trade and money-lending as a profession. He, therefore, decided that these people followed Hindu Law. There is upon the record overwhelming evidence that Pheru Mal and Daulat Ram, his brother, are ordinary *Khatri* traders, dealing in cloth, grain, etc., and borrowing capital for the purpose. It is clear, moreover, that they in no way subsist upon agriculture, although the family happens to own the "*be Chiragh*" estate of *Khairabad* which they have inherited from their ancestor Harjas Rai. The mere fact that they have owned this land for six or seven generations does not, in our opinion, create any presumption in favour of their being governed by agricultural custom in matters of alienation.

Counsel for appellant in this Court relies on 1 P. R. 1910 (*Mussammat Maya v. Gurdit Singh*) (1), and especially in the test there applied as to whether the family had been in possession of land for some generations

as a factor in deciding whether those concerned followed Customary Law or not. That, however, is only one of many tests which are applicable in the decision. The primary test, as has been held in numerous rulings of this Court, is whether agriculture is followed as a chief means of livelihood or not.

In the present case there can be no doubt that the chief means of livelihood is trade. Even where, as in 59 *P. R.* 1908 (*Lachman Das v. Pahla Mal*) (1) a case among Brahmans of the Amritsar district, it was shewn that the village proprietors were Brahmans devoted to agriculture, though some of them followed other professions such as trade or service, a Division Bench of this Court held that it was for the plaintiff to establish affirmatively that his family, in matters of alienation, were governed by Customary Law.

Again in 88 *P. R.* 1910 (*Dhera Singh v. Tara Singh*) (2), the parties were Bunjahi Khattris of the Rawalpindi district following the occupation of *dhobis* and owning no land in the village, it was held that, since agriculture was not the principal occupation of the parties, the *onus* of proving that the rules of Customary Law prevailed was on the plaintiff seeking to set aside the alienation.

In 43 *P. R.* 1911 (*Harnam Singh v. Mussammat Hardevi*) (3), it was held that in the case of Khattris the initial presumption is that they follow Hindu Law. Further, as pointed out in that ruling stress is always laid on the question, whether the claimants form a compact village community or at least a compact and considerable body of landowners in a more or less homogeneous village. In the present case the family to which plaintiff belongs merely possesses some 250 acres of land which has for revenue purposes been measured off into a separate estate and the family stands alone

Counsel for appellant also points out that, when Daulat Ram died his widow was recorded as holding a share equal to that of each of her brothers-in-law and that, if Hindu Law had been followed, the two brothers of Daulat Ram would have taken his share. We do not think, however, that this incident, easily explainable as it is on the ground of convenience in affording the widow a separate maintenance, can be held to tell in favour of the contention of the learned counsel. Nor does the fact that in the mortgage-deed impugned a specific share amounting to $\frac{1}{3}$ th or 43 acres is mortgaged shew that the parties are not governed by Hindu Law.

(1) 59 *P. R.* 1908.

(3) 43 *P. R.* 1911.

(2) 88 *P. R.* 1910.

We have no hesitation then in concurring with the finding of the learned Divisional Judge in the matter.

[The remainder of the judgment is not required for this report.]

Appeal dismissed.

No. 17.

Before Hon. Mr. Justice Shah Din and Hon.

Mr. Justice Agnew.

RULIA—(PLAINTIFF)—APPELLANT

Versus

SULTANA—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 817 of 1911.

Custom—succession—Muhammadan Law—Jat agriculturists, Jullundur district—non-ancestral land—distant kindred.

Held, following 110 P. R. 1906 (F. B.) (*Daya Ram v. Sohail Singh*) (1), that in the absence of proof of any custom governing the succession the case must be decided in accordance with the personal law which governs the parties.

Held also, that by Muhammadan Law the plaintiff, as brother of the last holder's mother, had a preferential right of succession to the defendant, the son of the granddaughter of the last holder's great-grandfather.

134 P. R. 1907 (F. B.) (*Hamira v. Ram Singh*) (2), 90 P. R. 1912 (*Niamatullah v. Mussammat Aisha Bibi*) (3), referred to.

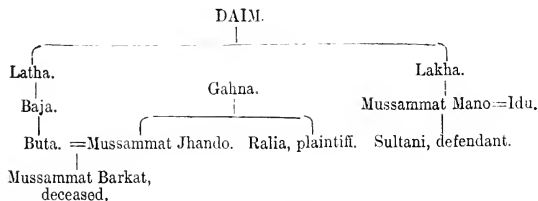
Further appeal from the decree of Lieutenant-Colonel G. C. Beadon, Divisional Judge, Ambala Division, at Ambala, dated the 30th March 1911.

Fazal-i-Hussain, for appellant.

Daulat Ram, for respondent.

The judgment of the Court was delivered by—

AGNEW, J.—The parties in this case are Jat agriculturists of the Jullundur district and the pedigree-table shewing their relationship is as follows :—



(1) 110 P. R. 1906 (F. B.).

(2) 134 P. R. 1907 (F. B.).

(3) 90 P. R. 1912.

The property in suit consists of 151 $\frac{1}{2}$ $\frac{0}{10}$ *kanals* of land which was acquired by Latha. The parties are admittedly governed generally in matters of inheritance by the Customary Law of the Province. On the death of Mussammat Barkat mutation was effected in favour of Sultani, defendant, apparently because through his mother he was of the blood of the common ancestor Daini. The following two issues, which are the only issues now germane to the discussion of this appeal, were framed :—

(2) Is plaintiff as maternal uncle of Mussammat Barkat entitled to succeed ?

Onus probandi on plaintiff.

(3) Is the defendant the daughter's son of Lakha, brother of Latha, the great-grandfather of the deceased Mussammat Barkat, entitled to succeed in preference to a maternal uncle ?

Onus probandi on defendant.

The first Court held that as the property was not ancestral between the claimants, the Customary Law did not apply and that under the Muhammadan Law plaintiff excluded defendant.

On appeal the learned Divisional Judge held, following 121 *P. R.* 1908 (*Bahadur v. Abdullah*) (1), that in the case of self-acquired land the collaterals, failing issue to the daughter, could object to alienations. He traced the inheritance back through Buta to Latha thence, since Latha's line was extinct, to Lakha whose daughter he held would, if alive, succeed ; since the daughter was dead the estate passed to her son, the defendant.

With regard to the ruling relied on by the learned Divisional Judge we think it sufficient to say that it has no application to the present case, inasmuch as Sultani, defendant, was not a collateral of the last male holder Buta ; he is related through the female line only.

Following the principle laid down in 134 *P. R.* 1907 (*F. B.*) (*Hamira v. Ram Singh*) (2), and followed in 90 *P. R.* 1912 (*Niamat Ullah v. Mussammat Aisha Bibi*) (3), we hold that for purposes of succession to the estate held by Mussammat Barkat she is not to be regarded as the great-granddaughter of Latha, but that it was for plaintiff on the one side or defendant on the other to prove affirmatively a custom under which the one or the other is entitled to succeed. In the absence of proof of any custom governing such a succession as is, under Customary

(1) 121 *P. R.* 1908.

(2) 134 *P. R.* 1907 (*F. B.*).

(3) 90 *P. R.* 1912.

Law, put forward by the one side or the other the case must, in view of the Full Bench decision in 110 P. R. 1906 (F. B.) (*Daya Ram v. Soheli Singh*) (1), be decided in accordance with the Personal Law which governs the parties. In the present suit neither party has proved the specific custom the burden of proving which was laid upon him by the appropriate issue. It follows that the inheritance must devolve according to the rules of the Muhammadan Law.

Under the Muhammadan Law the plaintiff, who is brother of Mussammat Barkat's mother, and the defendant, who is son of the grand-daughter of Mussammat Barkat's great-great-grandfather, both belong to the fourth class of distant kindred as described in Wilson's Digest of Anglo-Muhammadan Law, 4th edition, paragraph 258. But as the defendant is a descendant of a remoter ancestor he is excluded by the plaintiff, the child of an immediate grand-parent; see paragraph 261 of the Digest. The matter is made very plain in paragraph 59 of Mullah's Principles of Muhammadan Law, 2nd edition, paragraph 59. Under the classification there shewn the plaintiff as full brother of the mother of the proprietors, that is, a descendant of an immediate grand-parent, would come under group 1 (d) and would therefore exclude the defendant, a descendant of a remoter ancestor, who would come under the second group.

We, therefore, hold that the plaintiff is entitled to succeed to the inheritance of Mussammat Barkat. We accept the appeal, reverse the order of the Divisional Judge and give plaintiff a decree for possession of the land in suit. Under the circumstances we leave the parties to bear their own costs throughout.

Appeal accepted.

No. 18.

Before Hon. Mr. Justice Shah Din and Hon.

Mr. Justice Agnew.

SARDAR MUHAMMAD CHIRAGH KHAN AND
ANOTHER—(DEFENDANTS)—APPELLANTS

Versus

AMIR CHAND—(PLAINTIFF)—AND ATTAR CHAND—
(DEFENDANT)—RESPONDENTS.

Civil Appeal No. 182 of 1910.

Custom—Alluvion and Diluvion—village Girote, Tahsil Khushab, District Shahpur—Wajib-ul-arz—qabza malik loses his rights by submersion.

Held, that the *Ala maliks*, defendants, on whom the *onus* lay, had proved that a local custom exists in the village of Girote, Tahsil Khushab,

district Shahpur, whereby a *malik qabza* whose land is submerged in the river loses all his proprietary rights in that land and on its re-appearance it becomes the property of the *ala maliks*.

98 P. R. 1894 (F. B.) (*Dilsukh Ram v Nathu Singh*) (1), 33 P. R. 1903 (*Ahmad Shah v. Khuda Bakhsh*) (2), 15 P. R. 1904 (*Sahib Din v. Ilam Din*) (3), Civil Appeal 1208 of 1907 (unpublished).

19 P. R. 1876 (*Sahib Rai v. Khair Shah*) (4), 59 P. R. 1877 (F. B.) (*Sultan Khan v. Sayad Mahomed Shah*) (5), 96 P. R. 1879 (*Lal Shah v. Karim Bakhsh*) (6), 1 P. R. 1880 (*Chiragh v. Turel Khan*) (7), 152 P. R. 1883 (*Raja v. Sarfaraz*) (8), 97 P. R. 1902 (*Ghulam Mohay-ud-Din v. Faiz Bakhsh*) (9), 80 P. R. 1905 (*Deva Singh v. Bishambar Das*) (10), 8 P. R. (Rev.) 1901 (*Roshan v. Pohlo*) (11), and 4 P. R. (Rev.) 1912 (*Jangi v. Dalipa*) (12), referred to.

Further appeal from the decree of Q. Q. Henriques, Esquire, Divisional Judge, Shahpur Division, dated the 23rd June 1909.

Muhammad Shafi and Nanak Chand, for appellants.

Sheo Narain and Shah Nawaz, for respondents.

The judgment of the Court was delivered by—

31st July 1913.

SHAH DIN, J.—The plaintiff, Lala Amir Chand, is a *malik qabza* in *mauza* Girote, *taluk* Khushab, district Shahpur, and the first two defendants, who are the contesting defendants in the case, are full proprietors in the village, being admittedly descended from the original Baloch founder thereof. In the year 1904 the land in dispute, which was entered in the Revenue papers as owned by the plaintiff, was submerged by the action of the river Jhelum, and it re-appeared in the year 1907. On its re-appearance the defendants took possession of it, claiming to have become its owners on the strength of an entry in the *Wajib-ul-arz* of the village; and the plaintiff brought the present suit for recovery of possession in the beginning of 1908.

Both the Courts below have decreed the plaintiff's claim, holding that the defendants, on whom the *onus* lay, had failed to prove that there was a special custom in *mauza* Girote by which the land of a *malik qabza* which was submerged by the action of the river would become on its re-appearance the property of the Baloch proprietors; and the question for decision in this appeal is whether or not the custom relied upon by the defendants has been established. It is not disputed that in a case like the present the *malik qabza* whose land has been washed away is

(1) 98 P. R. 1894 (F. B.).

(2) 33 P. R. 1903.

(3) 15 P. R. 1901.

(4) 19 P. R. 1876.

(5) 59 P. R. 1877 (F. B.).

(6) 96 P. R. 1879.

(7) 1 P. R. 1880.

(8) 152 P. R. 1883.

(9) 97 P. R. 1902.

(10) 80 P. R. 1905.

(11) 8 P. R. (Rev.) 1901.

(12) 4 P. R. (Rev.) 1912.

entitled on its re-appearance, in the absence of a custom to the contrary, to take possession of it as owner, so that, if the custom alleged is not proved to prevail in the village in which the land is situated, the claim of the *malik qabza* to resume possession of his land must succeed. The simple question, therefore, in this case is, whether the special custom set up by the defendants has been proved by them.

In support of his clients' case the learned counsel for the defendants-appellants has relied on paragraph 21 of the *Wajib-ul-arz* of *Mauza Girote* drawn up at the settlement of 1858 ; on paragraph 6 (b) of the *Wajib-ul-arz* of 1892 ; and on the following judicial precedents relating to this very village in which the custom pleaded by the defendants is said to have been held established :—

- I. *Ram Kaur v. Allah Yar Khan and another*, decided by Mr. Johnstone, Assistant Commissioner, on the 30th March 1863.
- II. *Ali Muhammad v. Allah Yar and another*, decided by Captain Davies on the 9th January 1865. On appeal this case was remanded for re-decision by the Commissioner by order, dated the 22nd March 1865 ; and the case was decided a second time by Captain Davies on 12th July 1865. This decision was appealed to the Commissioner who rejected the appeal on the 11th September 1865, and a further appeal to the Financial Commissioner was also dismissed on the 15th January 1868.
- III. *Ali Muhammad v. Sardar Mubarik Khan*, decided by Diwan Tara Chand, Tahsildar, on the 31st October 1876. An appeal from his decision was dismissed by Maulvi Zulfiqar Ali on the 5th February 1877.
- IV. *Bawa Kanshi Das v. Jiwan Khan and others*, decided by Mirza Ahmad Beg, Tahsildar, on the 17th October 1883. An appeal from the decision of the Tahsildar was preferred to Mr. Clifford, Judicial Extra Assistant Commissioner, who accepted the appeal on the 24th of January 1884 ; but on further appeal the decision of the first Court was restored by Mr. (now Sir Charles) Roe, Additional Commissioner, on the 12th of June 1884.

In all these cases the claims of the various plaintiffs to recover possession of their lands on their re-appearance after

submersion were dismissed as against the Baloch proprietors who had taken possession of the same by virtue of their alleged rights as based upon the *Wajib ul-arz* entry. The appellants' counsel has further relied upon the following decisions of this Court :—

No. 98 P. R. 1894 (*F. B.*) (*Dilsukh Ram v. Nathu Singh*) (1), 33 P. R. 1903 (*Ahmad Shah v. Khuda Bakhsh*) (2), and 15 P. R. 1904 (*Sahib Din v. Ilam Din*) (3).

Further appeal No. 1203 of 1907 decided by Sir William Clark on the 9th of April 1908.

The learned Advocate for the plaintiff-respondent has contended that the entries in the *Wajib-ul-arz* of 1858 and of 1892 are not evidence of the special custom set up by the appellants and in any case do not carry much weight, and that the four judicial precedents relating to this village which are relied upon by the other side are insufficient to prove that a *malik gabza* in this village whose land is submerged loses all his proprietary rights therein and cannot recover possession of it on its re-appearance. The learned Advocate has cited the following authorities in support of his position :—

No. 19 P. R. 1876 (*Sahib Rai v. Khair Shah*) (4), 59 P. R. 1877 (*Sultan Khan v. Sayad Muhammad Shah*) (5), 96 P. R. 1879 (*Lal Shah v. Karim Bakhsh*) (6), 1 P. R. 1880 (*Chiragh v. Turel Khan*) (7), 152 P. R. 1883 (*Raja v. Sarfaraz*) (8), 97 P. R. 1902 (*Ghulam Mohay-ul-Din v. Faiz Bakhsh*) (9), 80 P. R. 1805 (*Dewa Singh v. Bishambar Das*) (10) and 4 P. R. (Rev.) 1912 (*Jangi v. Dalipa*) (11).

We now proceed to deal with the argument of the appellants' Counsel first. The entry in the *Wajib ul-arz* of 1858 runs as follows :—(the first portion of the entry is to the effect that the land of this village is subject to river action, that if more than 10 per cent. of the village area is washed away the land revenue will be proportionately remitted, and that if more than 10 per cent. re-appears the then land revenue will be similarly enhanced. Then follow the words which bear on the point before us) : *Aur jo zamin burd bar amad hogi us ka muamila zimme Ghulam Muhammad ke hoga khawah Sarkar chkhore khawah leve aur kisi malik ko dawu na hoga, aur ala*

(1) 98 P. R. 1894 (*F. B.*).

(2) 33 P. R. 1903.

(3) 15 P. R. 1904.

(4) 19 P. R. 1876.

(5) 59 P. R. 1877 (*F. B.*).

(11) 4 P. R. (Rev.) 1912.

(6) 96 P. R. 1879.

(7) 1 P. R. 1880.

(8) 152 P. R. 1883.

(9) 97 P. R. 1902.

(10) 80 P. R. 1905.

haz-ul-qiyas jo zamin bar amad hogi us men dusre ka wasita na hoga. Magar jo athais bigha zamin Jhanjhi Mal ne ba iwaz chaurasi rupia ke kharid ki thi woh darya burd hai, agar baramad hogi Jhanjhi Mal mazkur malik hoga.

The meaning of this entry is perfectly clear, and it is not disputed that, according to its terms, the land of any landowner in the village, who was not descended from the original Baloch founder, on being washed away would cease to be the property of its former owner. Ghulam Muhammad mentioned in this entry was the mortgagee from the Baloch proprietors and he admittedly represented the latter at the Settlement of 1858. The last portion of the entry is rather important, as, according to it, an exception was made in favour of one Jhanji Mal who had purchased 28 *bighas* of land for Rs. 84 before the settlement. This area was under water when the *Wajib-ul-arz* was drawn up, and as an exceptional favour to Jhanji Mal it was provided that, when the land in question re-appears, Jhanji Mal will continue to be its owner. We shall presently see that about this very land there was a suit in Court when it re-appeared in 1863, and that Jhanji Mal's successor in title was held to have lost whatever rights he had in the land by reason of its submersion. We may note here that the *Wajib-ul-arz* of 1858 purports to have been signed by a large number of proprietors, many of whom were apparently *malikan qabza* in the village.

The *Wajib-ul-arz* of 1892 reproduces word for word the above entry of 1858, and it is noteworthy that the new entry was made after a hot contest between the Baloch proprietors and some of the leading *malikan qabza* in the village who made an application on the 4th of December 1890 to the Settlement authorities asking that the old entry in paragraph 21 of the *Wajib-ul-arz* of 1858 regarding the loss of their proprietary rights in submerged lands be amended. After full enquiry the Settlement Tahsildar, Lala Ganga Ram, and the Revenue Assistant Mian Ghulam Farid, reported adversely to the *malikan qabza*, their opinion being that, in view of the previous civil litigation between the Baloch proprietors and the other landowners of the village the old entry should be repeated. The Settlement Collector, Mr. (now Sir James) Wilson, agreed with the Tahsildar and the Revenue Assistant, and by his order, dated the 1st April 1892, rejected the application of 4th December 1890. The applicants were referred to a civil suit to establish their alleged rights in submerged lands, but no such suit was brought by them. Clause 6 (b) of the *Wajib-ul-arz* in question appears to have been drawn up after the order

of the 1st April 1892 ; but the *malikan qabza* appear again to have disputed the correctness of the entry in question, and final orders were passed by Mian Ghulam Farid on the 14th of July 1893. He decided that to the said clause 6, which was a reproduction of the entry in the *Wajib-ul-arz* of 1858 relating to alluvion and diluvion, the following words be added :—*Jab malikan qabza ki zamin burd ho kar bar amad howe to us ke malik qaum Baloch honge.* By this addition the pre-existing rights of the Baloch proprietors to the ownership of such of the lands of *malikan qabza* as would re-appear after submersion were placed beyond doubt so far as the Settlement authorities were concerned. Since the order of the 14th July 1893 was passed, the present suit is, so far as the record shews, the first occasion on which rights of the Baloch proprietors as laid down in the *Wajib-ul-arz* of 1892 have been disputed.

Soon after the *Wajib-ul-arz* of 1858 was framed, disputes arose between some of the *malikan qabza* and the Baloch proprietors of this village as to their respective rights in submerged lands belonging to the said *malikan qabza*, and we shall refer in chronological order to the suits which arose out of those disputes :—

I. *The case of Ram Kaur v. Allah Yar.* The 28 *bighas* of land which Jhanji Mal had purchased before settlement, and which, as we have seen above, were under water when the *Wajib-ul-arz* was prepared, re-appeared some time in 1862, and it was taken possession of by the Baloch proprietors. Ram Kaur, son of Jhanji Mal, sued for possession on the ground that on its re-appearance the land continued to be his property. This claim was in accordance with the exception made in favour of Jhanji Mal by paragraph 21 of the *Wajib-ul-arz*. Ram Kaur's suit was, however, dismissed by Mr. Johnstone, Assistant Commissioner, on the 30th March 1863, on the ground, *inter alia*, that the Baloch proprietors were not bound by the arrangement come to as regards this land between their mortgagee Ghulam Muhammad and Jhanji Mal, and that the general rule laid down in the *Wajib-ul-arz* governed the case. The land in dispute was occupancy land. No appeal was preferred from Mr. Johnstone's decision.

II. *The case of Ali Muhammad v. Allah Yar.* This suit related to proprietary land which originally belonged to the plaintiff, Ali Muhammad, who was a *malik qabza* in the village. The land was washed away and it then re-appeared ; on its re-appearance it was taken possession of by the Baloch proprietors ; and the plaintiff sued to recover possession on the ground

that the submersion of the land did not work forfeiture of his proprietary rights. The claim was thrown out by Captain Davies, Deputy Commissioner, on the 9th of January 1865, the grounds of decision being that the entry in the *Wajib-ul-arz* under which, on the land of a *malik qabza* being washed away, the Baloch proprietors had to pay land revenue assessed on it, had been acted upon; that the plaintiff had lost all rights in the land; and that it must be presumed that the entry in the *Wajib-ul-arz* was made with the knowledge and consent of the *malik qabza* concerned. From the decision of Captain Davies there was an appeal to the Commissioner, Mr. Brandreth, who set aside the order of the Deputy Commissioner and sent the case back for further inquiry and re-decision. The Commissioner noted in his order that there was a great distinction between *malikan qabza* and occupancy tenants, and that even if an occupancy tenant were to lose his rights on his land being submerged, a *malik qabza* need not necessarily be subject to the same disability. The Commissioner directed that further investigation be made into the custom prevailing in the village of Girote and in the neighbouring villages as regards the rights of *malikan qabza* whose lands were submerged by river action. On the case going back, Captain Davies made the further inquiry directed, and as a result of that inquiry again came to the same conclusion at which he had arrived before. After referring to two decided cases bearing upon the question of custom, Captain Davies says in his judgment, dated the 12th July 1865 :—" These are both cases in point, they " seem exactly on all fours with this; and in both the claim " of the *malik qabzas* was rejected and the orders upheld " throughout in appeal up to the Financial Commissioner. In " these cases the principle that *malik qabzas* as regards land " once carried away, and subsequently regained from the river " occupy the same position precisely as hereditary cultivators " is affirmed, and I think very rightly, for, after all the distinc- " tion between the two is entirely of our own creating, the " *malik qabza* being nothing but a cultivator who, owing to " length of occupation without payment of proprietary dues to " the original proprietor, has obtained a modified proprietary " footing in the village. The *malik qabza* is quite a new " creation and is, I believe, confined for the most part to this " division. In the older districts the probabilities are he would " have obtained the *status* only of a hereditary cultivator. He " is only a make-shift; you cannot get rid of him altogether, " and so rather than introduce the double government of the

“proprietor and hereditary cultivator which is bad for both and for the land too, you transform the cultivator into a subordinate proprietor. But it is an incident of his tenure that, if the land is carried away, he loses his modified proprietary rights in it and they revert to the original proprietor. And this would seem most consonant with equity; the cultivator obtained his proprietary *status* through the forbearance of the real proprietor in times when land was not so valuable, and rights were not so easily lost as they are under our rule. Taking an abstract view of the case the cultivator's right was only one of occupancy; under an arbitrary rule we, on grounds of policy, converted this right of occupancy into a right of property. But when by the operation of natural causes the cultivator, transformed by our *fiat* into a proprietor, loses possession of the land which originally belonged to another, and the land is afterwards recovered, does not equity require that it should be restored to the original proprietors? I think so, and such was evidently the feeling which caused the entry to be made in the administration paper by which plaintiff's claim is barred.”

From the decision of Captain Davies an appeal was again preferred by the plaintiff to the Commissioner, but the appeal was dismissed. A further appeal to the Financial Commissioner was also rejected on the 15th January 1868. The Financial Commissioner says in his order that, in view of the previous decisions referred to by the Deputy Commissioner, the rule must be taken as settled that a *malik qabza* whose land is washed away by the river is on the same footing as an occupancy tenant, and that on the re-appearance of the land from the river he cannot resume possession of it as owner. This case of *Ali Muhammad v. Allah Yar* is, in our opinion, a valuable precedent in support of the appellants' claim in the present suit.

III. *The case of Ali Muhammad v. Mubarik Khan.* This suit related to occupancy land which had been carried away by the river and which had afterwards re-appeared and been taken possession of by the Baloch proprietors. The suit was dismissed by the Tahsildar on the 31st October 1876, and the appeal was rejected by the Judicial Extra Assistant Commissioner on the 5th February 1877. The latter officer in his judgment referred to the decision of Captain Davies, dated the 9th January 1865, and to the decisions of the Commissioner and Financial Commissioner in the last mentioned case, and held that the plaintiff was governed by the rule of custom laid

down in the *Wajib-ul-arz*. He noted further that, since the plaintiff had himself applied for remission of the land revenue in respect of the land in suit because of its submersion, and since the revenue had been paid by the Baloch proprietors as provided for in the *Wajib-ul-arz*, the plaintiff had lost all rights to resume possession of the land on its re-appearance.

IV. *The case of Kanshi Das v. Jiwan Khan.* This suit related to proprietary land. The plaintiff, Kanshi Das, a *malik qabza* in the village, sued the Baloch proprietors for recovery of possession, the land having re-appeared after submersion. The claim was dismissed by the Tahsildar on the strength of the *Wajib-ul-arz*, but on appeal was decreed by the Judicial Extra Assistant Commissioner. On further appeal the final judgment was delivered by the Additional Commissioner, Mr. (now Sir Charles) Roe, on the 12th June 1884, and he held that, according to the custom of this particular village, a proprietor who was not descended from the Baloch founder thereof, no matter whether he was a *malik qabza* or an occupancy tenant, lost all his rights in his land by reason of its submersion in the river. After referring to No. 59 *P. R.* 1877 (*F. B.*) and No. 152 *P. R.* 1883, which were relied upon by the plaintiff, Mr. Roe remarked in his judgment:—
 “No doubt the judgments quoted do lay down the rule that the custom is to be presumed to be in favour of the tenant until the contrary is proved, but what is the particular custom in each village is a question of fact to be proved by evidence. Of course, if there were no evidence, *i.e.*, if there were no entry in the *Wajib-ul-arz* and no precedent, the land would go to the tenant. But this is all that can be held to be laid down by the rulings of the Chief Court.”

“In the present case we have as evidence of custom:—

“I. The entry in the *Wajib-ul-arz*;

“II. The evidence of defendants’ witnesses,

“III. And of the Patwari.”

“The words of the *Wajib-ul-arz*, clause 21.....
 “make no special mention of tenants, or even *malik qabzas*;
 “they go much further than this; they assert that all land
 “thrown up by the river goes absolutely to the family of
 “Ghulam Muhammad, the Baloch proprietors. No one else—
 “be he proprietor or tenant—has any claim to it. It is, there-
 “fore, unnecessary to decide the precise *status* of the plaintiff.
 “He is not one of Ghulam Muhammad’s family and therefore

“ he can have no claim, if the above clause is a correct exponent
 “ of custom.....The *Wajib-ul-arz* derives its
 “ force, not from its professing to be an embodiment of a
 “ contract, but from its being presumed under the Land
 “ Revenue Act to be a correct exponent of existing custom.
 “ The fact that only a portion of the village were consulted
 “ when it was drawn up would no doubt lessen the value to be
 “ attached to it, but that is a very different thing from saying
 “ that it is invalid because the representatives of the parties
 “ in suit were not parties to the agreement. Whether they
 “ were present when the *Wajib ul-arz* was drawn up or not, it
 “ is equally incumbent on them to rebut by good evidence the
 “ presumption of its correctness. In the present case this
 “ presumption is unusually strong on account of the case quoted
 “ by the Judicial Assistant in which two occupancy tenants
 “ actually sued to have this very clause in the *Wajib-ul-arz*
 “ altered and their suit was dismissed on the ground that the
 “ entry was correct.”

As regards the village of Girote (prior to the present litigation), this is the latest expression of judicial opinion on the question of custom which is now under consideration before us, and it is all the more valuable because it proceeded from an officer of the experience and acumen of Mr. Roe who, not long after, rose to be a Judge of this Court and whose expositions of the rules of custom prevailing in the different parts of this Province have always been regarded with the greatest respect.

After the above mentioned decision of 1884 by Mr. Roe, no disputes seem to have arisen between the Baloch proprietors and any *malik qabza* or occupancy tenant with regard to recovery of possession of land belonging to the latter on its re-appearance after its submersion in the river, until, at the commencement of the Settlement operations in 1890, some of the *qabza maliks* applied for an amendment of paragraph 21 of the *Wajib-ul-arz* of 1858. As we have seen above, the application of the *qabza maliks* was rejected finally by the Settlement Collector on the 1st April 1892; and a second attempt by the *qabza maliks* to get the proposed entry in the *Wajib-ul-arz* revised was also frustrated by the final order passed by Mian Ghulam Farid on the 14th July 1893.

In support of the appellants' case, then, we have :—

- (1) the entry in the *Wajib-ul-arz* of 1858 ;
- (2) a similar entry in the *Wajib-ul-arz* of 1892, which was made after a hot contest between the Baloch proprietors and the *qabza maliks* ;

- (3) no less than four judicial precedents, spread over a period of about twenty years, from 1863 to 1884, in which the rights of the Baloch proprietors of this village to take proprietary possession of the lands of occupancy tenants or *qabzi maliks* on their re-appearance after submersion in the river were recognized and repeatedly confirmed after prolonged litigation. In not one single instance was the land of an occupancy tenant or of a *malik qabzi* restored to him by judicial authority after it had been carried away by the river; and it is a point of some importance in favour of the appellants that, in spite of the exception made in paragraph 21 of the *Wajib-ul-arz* in favour of Jhanji Mal, whose newly purchased land was then under water, as soon as that land re appeared from the river, it was taken possession of by the Baloch proprietors, and their right to take possession of it in accordance with the general rule of forfeiture laid down in the *Wajib ul-arz* was fully upheld by Mr. Johnstone, Assistant Commissioner, in 1863 in the case of *Ram Kaur v. Allah Yar Khan*, to which reference has been made above.

It seems to us, therefore, that, so far as this village of Girote is concerned, the appellants have made out a very strong case in support of their position that, when the land of any *malik qabza* is carried away by river action, the owner thereof loses his proprietary rights therein, and that on its re-appearance the land becomes the exclusive property of the Baloch proprietors. The fact that two out of the four judicial precedents noticed above relate to occupancy land, and not to proprietary land, makes no difference so far as this village is concerned, for, after the *Wajib-ul-arz* of 1853 had been drawn up, it was judicially decided in 1865 in the case of *Ali Muhammad v Allah Yar* that in *manza* Girote occupancy tenants and *qabza maliks* were on the same footing, and this view was again emphasized in the judgment of Mr. Roe in the case of *Bawa Kanshi Das v. Jiwan Khan*, which was decided in 1884.

We may now briefly notice the rulings of this Court which have been relied on by the appellants' learned counsel. 98

P. R. 1894 (*F. B.*) (*Dilsukh Ram v. Nathu Singh*) (1) has settled once for all that entries in a *Wajib-ul-arz* relating to questions of custom are not agreements between the members of the proprietary body, but that they are presumptive evidence of the existence of the rules of custom embodied therein. In 33 *P. R.* 1903 (*Ahmad Shah v. Khuda Bakhsh*) (2) it was held, on the strength of an entry in the *Wajib-ul-arz* of *mauza* Muradpur, *tahsil* Alipore, in the Muzaffargarh District, that an *adna malik* in that village could not recover possession of his land which had been submerged and had thereafter re-appeared from the river without paying *haq juri* to the *ala malik* who had taken possession of it. Thus the rights of the *ala maliks* to take possession of the lands of the *adna maliks* on their re-appearance from the river, as laid down in the *Wajib-ul-arz* of the village, were affirmed. In 15 *P. R.* 1904 (*Sahib Din v. Ilam Din*) (3) it was held that in cases of alluvion and diluvion according to the custom prevailing in *mauza* Khanpur, district Gujrat, a proprietor loses all his rights on the submersion of his land, as such land on restoration becomes *shamilat deh* and ceases to be the exclusive property of the proprietor to whom it belonged at the time of submersion. The entries in the *Wajib-ul-arz* of the village of the years 1868 and 1891 were given effect to, although it would seem that there were no judicial precedents shewing that the entries in the *Wajib-ul-arz* had been recognized before as having a binding force. In further appeal No. 1208 of 1907, the learned Chief Judge, Sir William Clark, held that in village Madwal, *tahsil* Alipur, an *adna* proprietor loses his proprietary rights in his land which is submerged in the river and is on its re-appearance taken possession of by the *ala* proprietor. The entry in the *Wajib-ul-arz* of the village was acted upon.

The learned Advocate for the respondent has strenuously contended that the custom set up by the appellants is most inequitable, inasmuch as it is directly opposed to the principles of universal law and justice underlying the enjoyment of proprietary rights in land which have been explained with such lucidity by Their Lordships of the Privy Council in the well known *Lopez* case; that in order to succeed in this case the appellants must give strict proof of such custom; and that such proof is not afforded by the entries in the *Wajib-ul-arz* of 1858 and of 1892 and by the four judicial precedents relating

(1) 98 *P. R.* 1894 (*F. B.*).(3) 15 *P. R.* 1904(2) 33 *P. R.* 1903,

to this village upon which reliance has been placed by the appellants' counsel.

The first part of the argument may at once be accepted as correct, for it must be conceded that the custom as to the loss of proprietary rights by a *malik qabza* in his land which has been submerged is *primâ facie* inequitable; and we further think that very satisfactory proof of such custom must be forthcoming before a Court of Law can be called upon to enforce it. The authorities cited by the learned Advocate do not go beyond this; and we certainly are not prepared to subscribe to the proposition which the learned Advocate endeavoured to press on our attention to the effect that the custom sought to be enforced by the appellants is so contrary to all notions of justice, equity and good conscience and so incongruous with modern conceptions of rights of ownership in land in a civilized society that the Courts should pronounce it as absolutely unreasonable and should decline to recognize and act upon it.

We may here briefly notice the rulings cited by the respondent's Advocate in support of his position.

No. 19 P. R. 1876 (*Sahib Rai v. Khair Shah*) (1), is referred to with approval in No. 59 P. R. 1877 (F. B.) (*Sultan Khan v. Sayad Mohamed Shah*) (2), which is the leading authority for the proposition that, in the absence of a custom to the contrary, an occupancy tenant whose land is submerged by river action does not lose his rights therein by reason of its submersion. This Full Bench case related to a plot of land situate in *mauza* Khai, *tahsil* Khushab, which had been carried away by the action of the river Jhelum. The *Wajib-ul-arz* of the village contained no provisions as to whether the rights of occupancy tenants in such of their lands as were submerged were lost or not, and the Courts below had found in that case that in the village of Khai and in the neighbouring villages there was no established custom as regards the loss of right by occupancy tenants in lands which had re-appeared after submersion. Boulnois, J., after referring to Nos. 19 and 18 P. R. 1876, observed in his judgment at page 153:—"It is clearly the opinion of the majority of the Judges of this Court that, in the absence of custom to the contrary, the land occupied by an hereditary cultivator, whether carried away by, or submerged in, a river, is not lost to him if it is thrown up again by the river or is left uncovered by the water." Since there were no provisions in

(1) 19 P. R. 1876.

(2) 59 P. R. 1877 (F. B.).

the *Wajib-ul-arz* of the village on the subject, and no satisfactory evidence of the alleged custom relied upon by the proprietors, who were defendants in that case, was given, the question of loss of rights in the submerged land was decided by this Court upon general principles applicable to such cases, and the soundness of those general principles is in no way disputed in this present case. The Full Bench ruling does not therefore help the respondent.

No. 96 P. R. 1879 (*Lal Shah v. Karim Bakhsh*) (1), related to land, situate in *mauza* Khairpur, *tahsil* Khushab, and the question for consideration in that case was the same as in the Full Bench case just cited. The case for the proprietors was somewhat stronger than the Full Bench case, in so far as there was an entry in the *Wajib-ul-arz* of the village to the effect that occupancy tenants lost all their rights when their land was submerged and that on re-appearance the proprietors had a right to occupy it. Apart from the entry in question, however, there was no satisfactory evidence of the assertion of the alleged right by the proprietors or of the forfeiture of the right on the part of the tenants; and it was held that the mere entry in the *Wajib-ul-arz* was not sufficient evidence of the custom set up by the proprietors, especially as the *Wajib-ul-arz* had not been attested by the occupancy tenants. After observing that there was no uniform custom established in the Shahpur District among the villages affected by river action as regards the rights of occupancy tenants being destroyed upon submersion of their lands, Plowden, J., says at page 264 of the report :—

“ We are thus, it seems to me, driven back to the village of Khairpur, and the question is whether there is any custom in that village by which the hereditary cultivators’ right is extinguished. And that question must, I think, be answered in the negative. All that it has to rest upon is the *ex parte* statement, as it may be fairly described, in the *Wajib-ul-arz*, and the fact that upon two previous occasions the *maliks* have without objection (as it seems) taken possession of lands submerged upon emersion. I do not think that can be said to establish a custom which is to take effect to deprive a hereditary cultivator of a right of property, which, in the absence of custom, he is by law entitled to retain. It is quite unnecessary, and would be most difficult, to lay down any proposition as to what would be proof of a custom in a

"particular village, sufficient to oblige a Court to affirm its existence. But whatever might be said of other villages where the instances had been frequent or the practice uniform for a considerable period, I think that all that can be affirmed as to this village is that there is no established custom."

It is clear from the above passage that the question of the existence of the custom such as we are considering in this case has to be decided with reference to the amount and quality of the evidence adduced in each particular case as regards the prevalence of the custom and in the village concerned, and if satisfactory proof of the prevalence of such custom in any particular instance is forthcoming, the general principles laid down in No. 59 P. R. 1877 (*Sultan Khan v. Sayad Mahomed Shah*) (1), and 96 P. R. 1879 (*Lal Shah v. Karim Bakhsh*) (2), will not stand in the way of such custom being enforced.

In 1 P. R. 1880 (*Chiragh v. Turel Khan*) (3), it was found that there was no established custom in *manza* Shergarh, *tahsil* Khushab, whereby a *malik qabza* loses his right in lands which have been submerged by river action. There was no express provision on the subject in the *Wajib-ul-arz* of the village; and after examining a judicial decision between the parties, which was relied upon by the full proprietor as against the *malik qabza* as having already settled the question in dispute, and after noticing two other cases which were relied upon as judicial precedents against the claim of the *malik qabza*, Plowden J., held that no local custom contrary to the general rule of law as enunciated in the previous decisions of the Court had been established in that case. The judicial precedents relied upon by the full proprietor were clearly distinguishable from the case before the Court; and in the absence of an express provision in the *Wajib-ul-arz* bearing on the question of custom involved, the case for the *malik qabza* stood wholly un rebutted.

No. 152 P. R. 1883 (*Raja v. Sarfaraz*) (4), does not help the respondent. In that case, which was one relating to village Sadda Kambo in *tahsil* Shahpur, certain occupancy tenants whose lands had been submerged and had on their re-appearance been taken possession of by the proprietors were held to be entitled to recover those lands, because it was found that the provision in the *Wajib-ul-arz* of the village as to the occupancy tenants preserving their rights by payment of revenue during the period of submersion had been duly acted upon by them. The

(1) 59 P. R. 1877 (F. B.).

(2) 96 P. R. 1879.

(3) 1 P. R. 1880.

(4) 152 P. R. 1883.

ruling in effect was that, no custom to the contrary being proved, an occupancy tenant did not lose his occupancy rights merely by reason of his land being submerged ; and that though there did exist in the village concerned a custom by which occupancy tenants became liable, under certain circumstances, to lose their rights on the submersion of their lands, still under that custom the tenants could preserve their rights intact, notwithstanding the submersion of their land, by paying the revenue assessed thereon during the period of submersion, though if they failed to do so during such period, their right of occupancy ceased to exist. This ruling certainly does not go to support the sweeping proposition sought to be laid down by the respondent's counsel that a village custom sanctioning the loss of rights in land on its submersion must always be considered as unreasonable and that Courts of law should not enforce such a custom.

The next ruling relied upon by the respondent's Advocate is 97 P. R. 1902 (*Ghulam Mohay-ud-Din v. Faiz Bakhsh*) (1). In that case which relates to *manza* Bullewahan, *tahsil* Muzaffargarh, the land of certain *adna maliks* had been washed away by the river Chenab, and on its re-appearance it was taken possession of by the *ala maliks* on the strength of an entry in the *Wajib-ul-arz* of the village to the effect that the submersion of *adna maliks'* land worked a forfeiture of their proprietary rights. It was found in that case that the *Wajib-ul-arz* of the settlement of 1866-67 contained no provision on the subject, shewing that there were at that time no *adna maliks* holding land on *adhlapi* tenure. The custom relied upon by the *ala maliks* was recorded in the later *Wajib-ul-arz* of the settlement of 1873-79 ; and there was no other evidence of any value on the record in support of the alleged custom. The village Patwari stated that in some instances the *adna maliks* whose lands had been submerged and had subsequently re-appeared had abandoned their claims, and that mutations in favour of *ala maliks* had been made by consent ; and some *adna maliks* also gave evidence supporting the Patwari. There were no judicial precedents at all relating to the village in question either for or against the alleged right of the *ala maliks* to claim the ownership of submerged lands belonging to *adna maliks* ; and this Court held that the evidence in support of the provision of the *Wajib-ul-arz* of 1879 was quite insufficient to establish the custom set up by the *ala maliks*. It is clear, therefore, that in the case under consideration it was only the solitary entry

in the *Wajib-ul-arz* of one settlement that was relied upon by the *ala maliks* in support of their claim; and the ruling of this Court that, in the absence of evidence that this entry had been acted upon, it could not be held that a custom in favour of the *ala maliks* had grown up in the village, can be of no great value in the present case in which the existence of the custom alleged by the Baloch proprietors has been proved not only by the entries in two successive *Wajib-ul-arzes*, but also by judicial decisions spread over a period of about twenty years.

No. 80 P. R. 1905 (*Dewa Singh v. Bishambar Das*) (1), again, does not afford us much assistance. There, the dispute was between the occupancy tenants of village Pakhiwan in the Gurdaspur District and their landlords, and it was held that by the custom of that village the land of occupancy tenants which is recovered from the river Ravi after submersion does not revert to the proprietors. The entry in the *Wajib-ul-arz* supported the alleged right of the proprietors; but, as held by this Court, it had no special value as a statement of custom, because it did not appear to have been uniformly acted upon, and, as an agreement between the parties, it was worthless, because the occupancy tenants were not shewn to have agreed to an arrangement by which their interests were disregarded.

No. 4 P. R. (Rev.) 1912 (*Jangi v. Dalipa*) (2), is a recent ruling by the Financial Commissioner, Punjab (Mr. M. W. Fenton), and it is to the effect that an entry in a *Wajib-ul-arz*, which lays down that occupancy tenants lose the portion of their tenancy which is submerged by a river, and that it goes to the owners on recovery, who will reduce the rent *pro rata*, is not enforceable (1) as being without consideration and (2) as being opposed to the provisions of Regulation XI of 1825. It will be observed that in that case the entry in the *Wajib-ul-arz* of 1869 was relied upon by the proprietors as an agreement between the occupancy tenants and themselves; and the learned Financial Commissioner held that the alleged agreement being one without consideration was not enforceable as such, and being one relating to alluvion and diluvion was *prima facie* opposed to the express provisions of Regulation XI of 1825. Viewed as a record of custom, the said *Wajib-ul-arz* entry was held to be of no value (1) because the *Wajib-ul-arz* of the previous settlement of 1851 contained no provision similar to the one in the *Wajib-ul-arz* of 1869, and (2) because there was no evidence that prior to 1869 the practice in the village was in accordance with the conditions laid down in the *Wajib-ul-arz*.

(1) 80 P. R. 1905.

(2) 4 P. R. (Rev.) 1912.

of that year. The learned Financial Commissioner further held following 8 P. R. (Rev.) (*Roshan v. Pohlo*) (1), that, in the absence of proof of custom to the contrary, the general rule in the Punjab must prevail, *viz.*, that an occupancy tenant does not lose his right by reason of the land of his holding being submerged. He, then, proceeded to consider whether in the case before him the proprietors had proved that a custom contrary to the general rule existed in their village, and he came to the conclusion that they had not. No judicial precedent relating to the village in question was forthcoming; and the proprietors relied upon the solitary case relating to another village in which, on the strength of an entry in the *Wajib-ul-arz*, it was held that occupancy tenants had lost their rights by reason of the submersion of their land. On the other hand, there was, according to the learned Financial Commissioner, a mass of evidence in decided cases relating to a large number of villages in the same *tahsil* to the effect that occupancy tenants were entitled to recover diluviated land in spite of provisions in the *Wajib-ul-arz* to the contrary. It is clear that the considerations which influenced the decision of the Financial Commissioner in the case under consideration do not apply to the case before us; and it will be observed that both Sir L. Tupper, in 8 P. R. (Rev.) 1901 (*Roshan v. Pohlo*) (1), and Mr. Fenton, in 4 P. R. (Rev.) 1912 (*Jangi v. Dalipa*) (2), agreed in laying down that if a custom is proved to exist in a village to the effect that occupancy tenants lose their right in their lands on submersion and that on re-appearance they revert to the proprietors, such custom can be given effect to. Strict proof of the existence of such a custom must no doubt be demanded, and it will be a question for consideration in each case whether, with reference to the evidence on the record, such proof has or has not been adduced by the party concerned.

Upon a review, then, of the whole evidence in this case and of the authorities cited on both sides, we hold that a local custom or usage has been proved to exist in the village of Girote, *tahsil* Khushab, whereby a *malik qabza* whose land is submerged loses all his proprietary rights in that land, and on its re-appearance it becomes the property of the Baloch proprietors.

We accordingly accept this appeal, and setting aside the decree of the lower Appellate Court, we dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

(1) 8 P. R. (Rev.) 1901.

(2) 4 P. R. (Rev.) 1912.

No. 19.

Before Hon. Mr. Justice Kensington and
Hon. Mr. Justice Rattigan.

MUSSAMMAT GAU HAR KHANUM—(PLAINTIFF)—
APPELLANT,

Versus

NAWAR KHAN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1074 of 1910.

Custom—dower—amount of—Khattars—Attock district.

Found that it was usual among Khattars of the Attock district to fix dower at very high amounts, but that there was in reality no intention on the part of the husband to pay these amounts nor expectation on the part of the wife that she would be paid such.

Civil Appeal 980 of 1894 (unpublished) referred to.

Found also, that by custom among the parties the amount of dower was not fixed at a particular sum and *held* that, having regard to the position of the husband and to the fact that the wife was a young woman of good family marrying a somewhat elderly man, who had already two wives living, the lower Court was justified in fixing the dower in this case at Rs. 10,000, of which Rs. 5,000 had been liquidated by presents of ornaments at the time of marriage.

Held also, that such part of the estate of plaintiff's deceased husband as is ancestral in the defendants' hands cannot be made liable for payment of any debt.

4 P. R. 1913 (F. B.) (*Jagdish Singh v. Bawa Narain Singh*) (1), referred to.

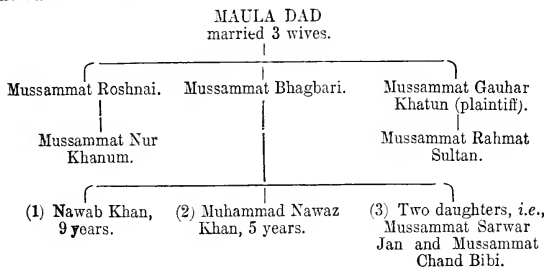
First appeal from the decree of Khan Taj Muhammad Khan, District Judge, Attock, at Campbellpur, dated the 6th June 1910.

Sheo Narain and Govind Das, for appellant.

Muhammad Shafi and Bhagat Ram, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—The following family table will help to 31st July 1913.
elucidate the facts :—



Maula Dad was a Khattar of *Mauza Hassu Khan, Tahsil Fattehjang*, District Attock, and was possessed of considerable property the value of which at the time of his death was about sixty or seventy thousand rupees.

On the 20th September 1905, he married the plaintiff, who was then a young girl of about 18 years of age, and at the time of this marriage his two first wives were alive. Maula Dad died on the 29th June 1908. The plaintiff, who has admittedly remarried since her late husband's death, sues the two surviving widows and their children for recovery of Rs. 25,125 which she alleges to be the prompt dower fixed at the time of her marriage and claims to recover the said amount from the property left by the deceased.

The defendants, with the exception of Mussammat Roshnai who admitted the claim, pleaded that the parties were bound by custom in matters relating to marriage and dower; that the dower was not recoverable from the estate of the deceased; that no such sum as Rs. 25,125 had been fixed; that in any event there was no intention on the part of Maula Dad to pay that amount; and that the utmost the plaintiff could claim would be the ordinary dower recognised by the custom of the parties which, according to defendants, would be a sum of about Rs. 500.

Issues were fixed covering the points in dispute, and after the parties had been given full opportunity to establish their respective cases, the District Judge, Khan Taj Muhammad Khan, delivered judgment on the 6th June 1910. The learned Judge found that the plaintiff's dower had been proved to have been fixed, as alleged by her, at the sum of Rs. 25,125. Defendants no longer dispute this fact. The learned Judge also found that among members of the Khattar tribe of the Attock district there is no particular custom limiting the amount of dower, which is fixed at sums varying from Rs. 300 to Rs. 60,000, but he added that "up till now there is no instance to show that in that tribe any suit had been instituted in a Court of Law for recovery of dower." He further found, for reasons given by him in detail at page 106 of the paper-book, that the amount fixed as plaintiff's dower was nominal, and that neither of the parties had any intention to give effect to the entry in the marriage register as it stood. He therefore proceeded to discuss the question whether plaintiff was entitled to *Mehr-ul-misl*, i.e., customary dower; and, if so, at what amount such dower should be fixed? He found that it is customary in the family of the

plaintiff to fix dowers of the ladies at very high figures, (e.g., Rs. 32,000 in the case of Mussammat Bani Begum, maternal aunt of the plaintiff), but he also found that none of these ladies have ever been paid their dowers in full. The only authenticated instance on the record of a large dower being paid was, according to the learned Judge, that of Mussammat Gulab Jan, who is said to have received Rs. 10,000 as her dower from her husband, Raja Abdul Aziz. The learned Judge was much impressed by this instance which, he says, "took place before the institution of the present suit and "could not be refuted by the defendants." Accepting this instance as a guide, the District Judge found that Rs. 10,000 was the *Mehr-ul-misl* to which the plaintiff was entitled, but that as she had received ornaments at the time of her marriage and as such ornaments, according to the custom of the tribe, were to be regarded as part of a wife's dower, the amount claimable by plaintiff would be about Rs. 5,000 as, in all probability, the ornaments given to her by Maula Dad at the time of her marriage were worth a similar sum. In connection with the latter point, the learned Judge arrives at his conclusion by reference to the evidence of Samanda Khan and Fateh Khan, witnesses for the plaintiff and defendants respectively, to the effect that the plaintiff was given ornaments worth Rs. 6,000 or Rs. 7,000 at the time of marriage. This statement the learned Judge regards as probably exaggerated, but he is of opinion that Maula Dad would not be likely to have given his young wife ornaments of less value than Rs. 5,000. Finally, the District Judge held that the plaintiff's dower was recoverable from the property left by Maula Dad and that the latter's entire estate was liable for payment of it. He accordingly granted plaintiff a decree of Rs. 5,000 on account of dower recoverable from the estate of Maula Dad, with costs proportionate to the amount decreed to plaintiff.

Both the plaintiff and defendants have appealed from this decree, the plaintiff urging that she should have been awarded the full amount claimed by her, the defendants contending that the District Judge erred in holding that the *Mehr-ul-misl* of plaintiff was Rs. 10,000; that it should have been fixed at Rs. 500; that as plaintiff had received jewelry worth much more than the latter amount her claim ought to have been dismissed; that the District Judge erred in admitting Mussammat Gulab Jan's case into evidence, that the receipt in that case upon which the learned Judge relied had not been legally proved and finally, that, in any event, a decree

could not be passed against such part of the estate of the deceased as was ancestral in the hands of the defendants, minor sons of Maula Dad.

We have heard Mr. Sheo Narain at some length in support of his appeal, but we agree with the learned District Judge that the evidence on the record fully proves that among members of the Khattar tribe in the Attock district the dowers of the ladies are fixed at very high amounts, but that there is, in reality, no intention on the part of the husband to pay those amounts nor expectation on the part of the wife that she will be paid such. Many witnesses referred to instances where the dower has been fixed at amounts of Rs. 10,000, 20,000, 30,000 and even Rs. 60,000, but there is no well established case where any such dower has been paid in full or indeed to anything like the extent at which it was fixed.

In this respect the custom of the parties resembles that of the Pathans of Kasur, which came under the consideration of a Division Bench of this Court in First Appeal No. 980 of 1894. As remarked by the learned Judges in that case the evidence before them showed that among the Pathans of Kasur it is customary to fix dowers of extravagant amounts and it is not unusual for a husband who could not raise a sum of Rs. 600 to agree to pay Rs. 60,000. Mr. Sheo Narain argued that these large amounts were fixed in order to provide a safeguard to the wife against the arbitrary exercise of her husband's power of divorce. In the case cited, it is observed that "extravagant dowers are clearly fixed to enhance the importance of the bride's family and to testify to the exalted nature of the connection which the bridegroom is forming. There may have been originally some idea that a husband with the prospect of having to pay an amount of dower far beyond his means would treat his wife well and would not divorce her, but this idea no longer exists. No one ever thinks of admitting the exact payment of such excessive dowers or indeed a dower at all, and there is no properly authenticated instance of a claim of such a nature having been put forward by the wife and acknowledged by the husband or his heirs. Large sums may have occasionally been paid to wives on account of dower, but in such cases it appears probable that there was no nearer heir besides the wife." These remarks are very opposite to the present case, and we are also much impressed with the force of the District Judge's reasoning for arriving at the conclusion that these Khattars, when contracting to pay enormous amounts

by way of dower have no intention of carrying the contract into effect. The argument, that the evidence in this case must be accepted with caution, because it is given by men who are testifying in their own interests and to the prejudice of their women folk, does not appear to us to have any force in view of the fact that many of these men have sisters and daughters who are married and who, under the express terms of their dower contract, could claim sums which their own brothers and fathers state in Court they have no right to claim. We did not consider it necessary therefore to hear Mr. Muhammad Shafi in reply to Mr. Sheo Narain upon *plaintiff's appeal*, which is accordingly dismissed with costs.

As regards *defendants' appeal*, there is no doubt a large body of evidence in support of the contention that the customary dower in this tribe does not exceed Rs. 500, and that in point of fact the ornaments given at the time of marriage are regarded as the equivalent of such dower. For instance, plaintiff's own brother-in-law (and her witness in this case), Khuda Dad, admits that ornaments given at the time of the marriage are in reality the *haq-mehr*, and even a person of the position of Sardar Dost Muhammad Khan, *Zaildar*, who is a *Rais* and *Kursinashin*, paying Rs. 6,000 annually as land revenue, states that at the time of his marriage his wife's dower was fixed at Rs. 500 and one gold *Mohar*. This witness, who appeared on behalf of the defendants, asserts that such is the practice generally in his family, and that the ornaments given to the bride at the time of the marriage are counted towards the dower. The instance relied upon by the District Judge, that of Mussammat Gulab Jan, has, in point of fact, not been proved, and he is in error in stating that the amount of Rs. 10,000 was paid to Mussammat Gulab Jan before the institution of the present suit. According to the copy of the receipt alleged to have been given by her (page 7 of the paper-book), the money is said to have been paid on the 22nd July 1909, whereas the present suit was instituted on the 6th July 1909. Neither Mussammat Gulab Jan nor her husband Raja Abdul Aziz were called as witnesses by the plaintiff to prove this transaction, and copy of the receipt is clearly inadmissible in evidence. It has not been proved by any one and there is nothing to show that the original is lost or cannot be produced, and the endorsement on the back of the copy merely shows that it was filed by the plaintiff and ordered to be put on the record by "A. C. Suri." On enquiry we are informed that "A. C. Suri" is the *Ahlmad*

of the District Judge's Court. Sardar Dost Muhammad Khan, who refers to this transaction between Mussammat Gulab Jan and her husband, states that no money was paid in his presence. There is thus absolutely no proof of the alleged payment by Abdul Aziz to his wife. At the same time it is not quite accurate to say that instances are not forthcoming of payment of sums of money exceeding Rs. 500. For instance, Ahmad Khan, a witness for plaintiff (page 91 of the paper-book), states that the dower of his first wife was Rs. 25,000, and that he paid her two or four thousand rupees prior to her death. He adds that the dower of his second wife was fixed at Rs. 10,000, and that he gave his wife Rs. 8,000 worth of ornaments and certain mortgage rights in land which he held in Fattahjang, the value of which was about Rs. 2,000. In cross-examination the witness reduces the value of the ornaments given to the second wife to Rs. 4,000, but it is clear from this and other evidence on the record that fairly large sums are occasionally, though possibly rarely, given as dower to the wife. In no instance has any cash been given approaching, even approximately, to the amount of Rs. 25,000 claimed by the plaintiff, but having regard to the position of Maula Dad and to the fact that the plaintiff was a young woman of good family, marrying a somewhat elderly man who had already two wives living, we do not think that the amount of Rs. 5,000 awarded to her by the District Judge (who is himself a Muhammadan of Kohat) is in the circumstances unreasonable. We, therefore, uphold his decree *pro tanto*.

As regards the question, whether the decree can be executed against the ancestral property of the minor defendants, we have no hesitation in holding, on the strength of the Full Bench Ruling in 4 P. R. 1913 (*Jagdip Singh v. Bawa Narain Singh*) (1), that such part of the estate as is ancestral in the defendants' hands cannot be made liable for payment of a debt which Mr. Sheo Narain himself admits is unsecured.

We accordingly so far accept defendants' appeal as to hold that the sum of Rs. 5,000 decreed to plaintiff cannot be recovered from the ancestral property left by Maula Dad, but in all other respects it stands dismissed. Upon this appeal we leave the parties to bear their own costs.

No. 20.

Before Hon. Mr. Justice Kensington and Hon.

Mr. Justice Rattigan.

MURLI DHAR—(DEFENDANT)—APPELLANT

Versus

GOBIND RAM—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 455 of 1912.

Indian Registration Act, XVI of 1908, section 17 (2), (i), (v)—unregistered compromise of a civil suit—admissibility in evidence.

The parties to a civil suit came to terms, and executed a written deed of compromise whereby they agreed to divide the various properties therein specified between themselves, the said properties being expressly allotted to one or the other, and to execute thereafter such document as might be necessary to effectuate their intentions. This deed of compromise was written on a paper which bore an eight-anna Court-fee stamp, and was addressed as a petition to the Court, the parties to it praying that, as they had privately divided the properties between themselves, the Court might be pleased to dismiss plaintiff's suit in accordance with the terms of the said compromise; the Court examined the parties and dismissed the suit accordingly.

Held, following 27 P. R. 1906 (*Khair-ul-Nisa v. Bahadur Ali*) (1), that the deed of compromise did not require registration under section 17 of the Registration Act and was admissible in evidence.

Bindesri Naik v. Ganga Saran Sahu (2) and *Natesa Chetti v. Vengu Nachiar* (3), referred to.

Lakshamma v. Kameswara (4), *Panchanan Bose v. Chandi Charan Misra* (5) and *Gurdeo Singh v. Chandrikah Singh* (6), distinguished.

Second appeal from the decree of A. H. Parker, Esquire, Divisional Judge, Multan Division, dated the 7th March 1912.

Sheo Narain for appellant.

Pestonji Dadabhai, Manohar Lal and Roshan Lal for respondent.

The judgment of the Court was delivered by—

RATTIGAN, J.—Plaintiff and defendant are father and son, 31st July 1913.
and the present suit relates to a long standing dispute between them as to the partition of the family property *inter se*. They originally agreed to refer the dispute to arbitration, but, as there was some difficulty in getting the matter settled, the plaintiff applied under section 523, Civil Procedure Code of 1882, to have the agreement filed in Court. Thereafter, he

(1) 27 P. R. 1906.

(2) (1897) I. L. R. 20 All. 171 (P. C.).

(3) (1909) I. L. R. 33 Mad. 102.

(4) (1889) I. L. R. 13 Mad. 281.

(5) (1910) I. L. R. 37 Cal. 808.

(6) (1907) I. L. R. 36 Cal. 193
(p. 223).

and his son (it is said at the instance of friends) came to terms, and executed a written deed of compromise whereby they agreed to divide the various properties therein specified between themselves, the said properties being expressly allotted to one or the other, and to execute thereafter such document as might be necessary to effectuate their intentions. This deed of compromise was written on a paper which bore an eight-anna Court-fee stamp, and was addressed as a petition to the Court, the parties to it praying that, as they had privately divided the properties between themselves, the Court might be pleased to dismiss plaintiff's suit in accordance with the terms of the said compromise. The Court examined plaintiff and defendant with reference to the terms of their agreement, and both parties informed the Court that they fully agreed to accept those terms, and that their prayer was that the suit might be dismissed on the basis thereof. This was accordingly done.

Plaintiff now sues on the agreement for possession of the properties which defendant agreed to surrender to him, and for an order directing defendant to execute the necessary documents. Defendant pleads (1) that the agreement was compulsorily registrable, and, not being registered, was inadmissible in evidence; (2) that there was no consideration for the agreement; and (3) that it was exacted from him by undue influence. The Sub-Judge found that the agreement had been executed without any exercise of undue influence and was for consideration, but held nevertheless that plaintiff's suit must fail, as the deed of compromise created rights in property exceeding Rs. 100 in value and could not be accepted in evidence, as it was not registered.

Plaintiff appealed to the Divisional Judge, who held upon the authority of the ruling of Their Lordships of the Privy Council in *Bundesri Naik v. Ganga Saran Sahu* (1) and of the decisions of this Court in No. 27 P. R. 1906 (*Khair-ul-Nisa v. Bahadur Ali*) (2) and of the Madras High Court in *Natesa Chetti v. Vengu Nachiar* (3), that the terms of the compromise had been so incorporated into the order of the Court in the former proceedings as to make the document admissible in evidence, though unregistered. The learned Judge, in his judgment makes no reference to defendants' pleas as to want of consideration or undue influence, and Mr. Sheo Narain has had to admit that in all probability these pleas were not urged

(1) (1897) *I. L. R.* 20 *All.* 171 (*P. C.*).

(2) 27 *P. R.* 1906.

(3) (1909) *I. L. R.* 33 *Mad.* 102.

before him. Plaintiff's suit was accordingly decreed with costs, and the decree passed in his favour was for "possession of the property in suit and for execution and registration of the withdrawal deeds."

Defendant has preferred a further appeal to this Court and we have heard his learned Advocate, Mr. Sheo Narain, at length on his behalf. The pleas as to want of consideration and the exercise of undue influence were again urged before us, but not seriously, Mr. Sheo Narain candidly admitting that, as they had apparently been dropped in the lower Appellate Court, they could hardly be urged with any force in this Court. But, apart from this objection, we are unable to give any weight to them. It is absurd to say that the deed of compromise was without consideration, as it was upon the strength of it that plaintiff was induced to withdraw the proceedings which he had instituted under section 523 of the Civil Procedure Code of 1882, and the plea of undue influence was palpably ridiculous. Defendant did not venture to depose as a witness to any such influence having been brought to bear upon him, and the evidence of his two witnesses (Ramji and Jangu Mal) that he had been threatened by third persons with pains and penalties if he failed to accept the compromise is absolutely worthless. The learned Advocate was, therefore, well advised in practically throwing those pleas overboard.

There remains the question, whether the deed of compromise was admissible in evidence, though unregistered, and upon this point we have no hesitation in agreeing with the Divisional Judge. The deed was in the nature of a petition presented to the Court and it was accepted as such by the Court. The parties were duly examined in Court; the deed was read out to them, and it was only when they both admitted its correctness and prayed that the proceedings might be decided in accordance therewith, that the Court decided to take action and to dismiss the suit. In our opinion the present case is, for all practical purposes, identical with that reported as No. 27 P. R. 1906 (*Khair-ul-Nisa v. Bahadur Ali*) (1) and falls within the purview of the principle there laid down.

Mr. Sheo Narain argues that the two cases are distinguishable, because in the present case the deed of compromise not only creates rights in the properties but also gives the parties a right to obtain another document which, when executed, will finally settle the rights of the parties *inter se*. On this ground,

he contends that the present deed is not covered either by the authority above-mentioned or by the provisions of section 17 (2), clause (5), of the Indian Registration Act (XVI of 1908). We confess we are unable to appreciate this argument. If the deed creates rights of itself, it would in the ordinary course be compulsorily registrable. But being in the nature of a petition addressed to the Court and having been incorporated into the record of the former suit, it is, on the authority of No. 27 P. R. 1906 (*Khair-ul-Nisa v. Bahadur Ali*) (1), admissible in evidence though not registered. Is it any the less admissible, because it contains a provision whereby the parties undertake to execute a deed to assure each other in the properties respectively surrendered to them? A deed which did not *per se* create rights in property, but merely gave the parties the right to obtain another document would not be compulsorily registrable (section 17 (2), clause 5 of the said Act). How then can it be seriously argued that the addition of such a provision to a deed, which is not otherwise inadmissible in evidence for lack of registration, transforms the character of the deed and makes it inadmissible in evidence unless registered?

The authorities cited by Mr. Sheo Narain in no way support his argument. In *Lakhshamma v. Kameswara* (2) an ordinary deed of partition which related to immovable property above Rs. 100 in value was held to be inadmissible in evidence, owing to lack of registration, because it declared existent rights in such property, it being none the less inadmissible because it contained a further clause providing for the execution of another deed with reference to property as to which immediate division was not possible.

In *Gurdeo Singh v. Chandrikah Singh* (3), it was held that a deed of compromise accepted by a Court could not be received in evidence, unless duly registered, in so far as it purported to affect rights in immovable property above the value of Rs. 100, when such property was *extraneous to the litigation*, a proposition of which the correctness is open to doubt (see *Natesa Chetti v. Vengu Nachiar* (4)). In the present case, however, it is not denied that the dispute between the parties which was to have been referred to arbitration related to all the property now in suit. In the proceedings under section 523 of the Civil Procedure Code, therefore, the dispute which

(1) 27 P. R. 1906.

(2) (1889) I. L. R. 13 Mad. 281.

(3) (1907) I. L. R. 36 Cal. 193 (223).

(4) (1909) I. L. R. 33 Mad. 102.

was eventually compromised, covered all the property of the family, and the authority in question is thus entirely irrelevant. *Panchanan Bose v. Chandli Charan Misra* (1) is an authority merely to the effect that a document which contemplates the subsequent execution of a formal deed which is to determine and create the rights of the parties, falls under clause (h) of section 17 (2) of the Registration Act of 1877 and as such does not require registration. This authority, so far as it goes, is against the defendant-appellant, and in any event does not help his case.

For these reasons we hold that the deed of compromise was rightly admitted in evidence, and as the other pleas of defendant have failed, we dismiss the appeal with costs. We have only to add that the decree of the lower Appellate Court is rather enigmatically worded, in so far as it relates to the execution of "withdrawal deeds." What is apparently meant is that the defendant shall execute such document or endorsement as may be necessary to assure plaintiff in the full enjoyment of the properties to be surrendered by defendant to him. We are not, however, asked to interfere with the decree and we therefore leave it as it stands.

Appeal dismissed.

No. 21.

*Before Hon. Mr. Justice Kensington and Hon.
Mr. Justice Shah Din.*

MUSSAMMAT GOSIA BEGAM—(DEFENDANT)—
APPELLANT

Versus

UMED ALI AND ANOTHER—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 959 of 1910.

Custom—inheritance—Usmani Sheikhs, Gurgaon District—remote collaterals do not exclude daughters.

Held, that no custom had been established among Usmani Sheikhs of the Gurgaon district whereby collaterals in the 8th degree were entitled to exclude the daughter of the last male holder.

Further appeal from the decree of S. Clifford, Esquire, Additional Divisional Judge of Delhi, dated the 5th May 1910.

Jalal-ud-Din for appellant.

Respondent in person.

The judgment of the Court was delivered by—

2nd August 1913.

KENSINGTON, J.—The parties to the suit are Usmani Sheikhs of the Gurgaon district. The point to be determined is, whether the daughter of the last male owner is excluded from inheritance by collaterals 8 degrees removed.

Mutation was here effected in favour of the daughter on the death of her father Hatim Ali and of his widow, the latter dying in November 1908. The case has therefore come into Court in the form of a suit by the collaterals for possession.

The District Judge dismissed plaintiffs' suit, but the learned Divisional Judge has given them a decree for $\frac{3}{4}$ th of the area of about 29 *bighas* in dispute.

We have naturally great respect for a decision on a question of the kind by an officer of Mr. Clifford's experience, but we think that he has failed to see how strongly the burden of proof rests upon the plaintiffs, and that he has also been misled into attaching undue importance to such instances as have been traced in the family (see pedigree at page 8 of the paper-book) as proving that a daughter is excluded by even such very remote collaterals as the plaintiffs.

Rather strangely no reference has been made by the lower Appellate Court to the general custom of Mussalman tribes in the Punjab as summarised under exception 2 to article 23 of Rattigan's Digest of Customary Law. The conclusion from rulings there cited is that a daughter is very rarely excluded by collaterals in the 8th degree, especially among endogamous Muhammadans.

Usmani Sheikhs admittedly stand on the same footing as Qureshis, Sadiqis and Ansaris, in that they all are what are commonly described as true Sheikhs tracing their origin from Arabia. As such they have been rightly classed with Sayads in the *Riwaj-i-am* of 1877, which is quoted in Mr. Clifford's judgment. It was admitted before us by the principal plaintiff Umed Ali that his tribe intermarry with Sayads (if Sunnis), and that, as a fact, the defendant herself is married to a Sayad which goes some way to support the *Riwaj-i am*, and we find it difficult to follow the commentary on the statement of custom given at page 145 of Volume II of Tupper's Customary Law, or Mr. Clifford's argument at page 19 of his judgment.

Then again turning to the instances in the family to prove exclusion of daughters by collaterals we cannot hold that they help plaintiff much. They are four in number, as follows :—

- (1) Hatim Ali's case, where a daughter was excluded by a brother. This really proves nothing.
- (2) Umed Ali's cases, where he excluded—
 - (a) a female 2nd cousin, daughter of Karim Bakhsh, and
 - (b) a female 1st cousin, daughter of his uncle Amin-ud-din.

Here again the instances prove nothing, as Umed Ali was himself married in each case to the daughter of the last male owner, and the family arrangements made had little or no practical effect.

- (3) Gauhar Ali's case, where a daughter was excluded by her first cousin (father's brother's son).

Instances of the kind, where the collaterals are very near relatives or themselves connected by ties of marriage as well as blood, are very far from establishing the conclusion that male collaterals, however remote, will always exclude a daughter from inheritance, notwithstanding a positive entry to the contrary in the *Riwaj-i-am*, and also notwithstanding a whole series of rulings in favour of the daughter quoted under article 23 of Rattigan's Digest of Customary Law. We cannot agree that the plaintiffs have made out any sort of case for ousting the defendant from her father's land in opposition to what is so clearly the general custom among high class Muhammadans, whose views on customary inheritance are notoriously tinged to a considerable extent by their predilection for Muhammadan Law.

We accept the defendant's appeal, set aside the decree of the lower Appellate Court and restore that of the District Judge dismissing plaintiffs' suit with costs throughout to the defendant.

Appeal accepted.

No. 22.

Before Hon. Mr. Justice Kensington and Hon.
Mr. Justice Shah Din.

MUSSAMMAT NARAIN DEVI—(PLAINTIFF)—
APPELLANT

Versus

HIRA AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 52 of 1911.

Punjab Tenancy Act, XVI of 1887, sections 59 and 112—succession to occupancy holding—entry in Wajib-ul arz of Settlement Record, 1869—1873.

The question being whether succession in this case could be governed by an agreement between landlords and occupancy tenants incorporated in the village *Wajib-ul-arz* as framed in a revision of the record of rights of the *Una tahsil* extending over the years 1869—1873.

Held, that for the purposes of section 112 of the Tenancy Act the Court can only consider the *Wajib-ul-arz* of the revised record.

Held further, that as the *Wajib-ul-arz* was a part of the record taken up in 1872 and not finally attested by the Settlement Tahsildar till the 25th March 1873 the entry relied on did not fulfill the condition of section 112 in regard to time.

The conflict between the rulings in 97 *P. R.* 1909 (*Fateh Bakhsh v. Lehna*) (1), 38 *P. R.* 1910 (*Allah Ditta v. Achhru Mal*) (2) and Civil Revision 400 of 1908 (unpublished) and the rulings 47 *P. R.* 1877 (*Ranjha v. Chuhar*) (3), 64 *P. R.* 1877 (*Jowahir Singh v. Asa*) (4), 22 *P. R.* 1882 (*Lehna v. Chetu*) (5), 196 *P. R.* 1889 (*Mussammatt Jiwan v. Ibrahim*) (6), 20 *P. R.* 1896 (*Phina Singh v. Mahtob Khan*) (7) and 130 *P. R.* 1907 (*Puran v. Mamun*) (8), pointed out.

Further appeal from the decree of J. P. Thompson, Esquire, Divisional Judge, Hoshiarpur Division, dated the 13th May 1910.

Sundar Das for appellant.

Nihal Chand for respondents.

The first order of the Court was delivered by—

4th July 1912.

KENSINGTON, J.—This appeal has been admitted to a Division Bench in consequence of a conflict of authority. The question is, whether the lower Appellate Court should have followed the single Judge rulings published as 97 *P. R.* 1909 (*Fateh Bakhsh v. Lehna*) (1) and 38 *P. R.* 1910 (*Allah Ditta v. Achhru Mal*) (2), read with an unpublished decision of 26th

- (1) 97 *P. R.* 1909.
- (2) 38 *P. R.* 1910.
- (3) 47 *P. R.* 1877.
- (4) 64 *P. R.* 1877.

- (5) 22 *P. R.* 1882.
- (6) 196 *P. R.* 1889.
- (7) 20 *P. R.* 1896.
- (8) 130 *F. R.* 1907.

February 1909 by the same learned Judge in Civil Revision No. 400 of 1908, in preference to a number of previous rulings more or less in point contained in—

47 P. R. 1877 (*Ranjha v. Chuhar*) (3), 64 P. R. 1877 (*Jowahir Singh v. Asa*) (4), 22 P. R. 1882 (*Lehna v. Chetu*) (5), 196 P. R. 1889 (*Mussammat Jiwan v. Ibrahim*) (6), 20 P. R. 1896 (*Phina Singh v. Mahtab Khan*) (7) and 130 P. R. 1907 (*Puran v. Mamun*) (8).

It is further contended for the plaintiff-appellant that even under the ruling 130 P. R. 1907 (8) the defendant is out of Court, as he only acquired an occupancy title on the 5th March 1877, and had no subsisting right in the year 1869 which is given as the date of the *Wajib-ul-arz* now in question.

We do not express any opinion about this latter contention, but there is some difficulty in following the argument of the late learned Chief Judge on the point unless the word "subsists" as used in section 112 (b) of the Tenancy Act can be read as meaning "subsisted."

In any case at the outset of the argument in appeal it occurred to us as very doubtful whether the *Wajib-ul-arz* in question really was compiled before the 18th November 1871, as revision of the settlement record of rights for the *Una tahsil* of the Hoshiarpur district was only undertaken in 1869 (see paragraph 4 of Mr. Roe's report) and was not completed till some years later.

The point cannot be cleared up without seeing the settlement record of 1869-1874 for the village Dher, *Thana Anandpur, Tahsil Una*, District Hoshiarpur, and we feel unable to proceed with the appeal until this has been done.

We accordingly direct that the record in question be now sent for. On receipt, a fresh date will be fixed for continuing the hearing of the appeal before us as a special Bench, if possible, in November 1912.

It may be observed as regards the conflict of authority that the same difficulty was experienced in Civil Appeal No. 105 of 1911, but as that case was ultimately settled by compromise on the 21st November 1911 the point was not decided.

(1) 47 P. R. 1877.
(2) 64 P. R. 1877.
(3) 22 P. R. 1882.

(4) 196 P. R. 1889.
(5) 20 P. R. 1896.
(6) 130 P. R. 1907.

24th Oct. 1913.

The judgment of the Court was also delivered by—

KENSINGTON, J.—Our previous order in this case, dated 4th July 1912, should be read as part of the judgment. The area in dispute is $13\frac{8}{10}$ kanals previously held in occupancy right by Mussamat Buti. On her death in 1876 the collaterals of her husband Dhuman allowed the succession to go to her son-in-law Mutsaddi as part of the settlement of a dispute about a larger area effected on the 5th March 1877. Mutsaddi acquired the occupancy right in this small area on that date.

On the death of Mutsaddi's widow in 1905 his collaterals were successful in a suit for the land brought by them against the collaterals of Dhuman. The judgment of the Divisional Court in that suit (see Civil Revision 164 of 1907) recognised that the rights of the landlord might still have to be determined as he was no party to the suit, and this is the point now before us in a further suit by the landlord against the decree-holders of 1906.

The lower Courts have disagreed, the Munsif giving a decree to the plaintiff while the learned Divisional Judge, feeling unable to follow the single Judge ruling of this Court in 38 P. R. 1910 (*Allah Ditta v. Achru Mal*) (1), has dismissed the suit by a judgment which discusses at some length the apparent conflict between that ruling and others detailed in our order of 4th July 1912. It then appeared to us that this decision might be beside the point, and that the real question was, whether, in this particular case, succession could anyhow be governed by the supposed agreement between landlords and occupancy tenants incorporated in clause 8 of the village *Wajib-ul-arz* as framed in a revision of the record of rights of the *Una tahsil* extending over 1869-1873. The point is, whether that agreement is still effective under section 112, Tenancy Act, as an entry made in a Settlement Record before the 18th November 1871.

We have now closely examined the original Settlement record of 1873, and find that the *Wajib-ul-arz* was a part of the record taken up in 1872 and not finally attested by the Settlement Tahsildar till the 25th March 1873. It does not therefore fulfil the conditions of section 112, Tenancy Act, so far as clause 8 is concerned, even if an initial difficulty is got over that there was no formal signature of the document by the landlords and tenants concerned. Counsel for the defendants-respondents has argued that the *Wajib-ul-arz* of 1872-1873

may have merely perpetuated an earlier condition of a similar nature incorporated in the first Settlement Record of about 1852. There is no proof how far this is correct, but in any case we, to that extent, accept the argument in the ruling 97 P. R. 1909 (*Fateh Baksh v. Lehna*) (1). For the purposes of section 112, Tenancy Act, we have to consider the *Wajib-ul-arz* of the revised record alone.

The result is, that we must leave still undetermined the difficult question of the proper construction of the conflicting rulings mentioned in our previous order. All that part of the decision in the lower Appellate Court's judgment is unnecessary owing to omission to verify the actual date of the *Wajib-ul-arz* of the revised record. The so-called agreement in that document has no legal effect under section 112, and to decide the course of succession we must look to the terms of section 59 only.

The case, then, presents no difficulty. The collaterals of Mutsaddi cannot succeed, as the land was not occupied by his and their common ancestor. The occupancy rights have been extinguished on the death of his widow and the landlord is entitled to the land. The appeal is accordingly accepted. The decree of the Divisional Court is reversed and that of the Munsif, in favour of the plaintiff, is restored with costs throughout to the plaintiff.

Appeal accepted.

No. 23.

Before Hon. Mr. Justice Shah Din.

JAI RAM—(PLAINTIFF)—APPELLANT

Versus

SARDAR SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 802 of 1911.

Custom—alienation—Brahmins of Mauza Dheriala Saigan, Tahsil Gujar Khan, Rawalpindi district—ancestral property—Hindu Law.

Held, that the Brahmins of *Mauza Dheriala, Tahsil Gujar Khan, Rawalpindi district* are, in matters of alienation, governed by custom and that one of the most important tests in determining whether a certain caste is or is not governed by agricultural custom is whether they form a compact village community or at least a compact section of the village community. In such cases there is a strong presumption in favour of the applicability of custom.

63 P. R. 1910 (2) followed.

(1) 97 P. R. 1909 (*Fateh Baksh v. Lehna*).

(2) 63 P. R. 1910 (*Bishen Das v. Ram Dhan*).

94 P. R. 1907 (1), 125 P. R. 1908 (p. 569) (2), 56 P. R. 1909 (3), 87 P. R. 1909 (4), 34 P. R. 1911 (5), 1 P. R. 1910 (6) and (1912) 13 Indian

Cases 709 (7), referred to.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Rawalpindi Division, dated the 25th April 1911.

Govind Das, for appellant.

Sewa Ram Singh, for respondents.

The judgment of the learned Judge was as follows :—

20th May 1913.

SHAH DIN, J.—A preliminary objection has been urged in this case by the pleader for the respondents that since the Divisional Judge has dismissed the plaintiff's suit and the value of the suit, calculated at thirty times the *jama*, is below Rs. 250, no further appeal lay to this Court under the unamended Punjab Courts Act. As the Munsif passed a decree in favour of the plaintiff for possession of part of the land on payment of Rs. 600, I hold, following 23 P. R. 1909 (8), that a further appeal was competent to this Court. The preliminary objection is therefore overruled.

The sole question for decision in this appeal is, whether the parties to this suit, who are Brahmin proprietors of *Mauza Dheriala Saigan*, *Tahsil Gujar Khan*, District Rawalpindi, are governed in matters of alienation of ancestral landed property by Hindu Law or by custom? The Subordinate Judge held that they were governed by custom, and not by their personal law, while the Divisional Judge has come to a contrary conclusion. After hearing the pleaders on both sides and carefully considering the evidence on the record, I think that the view of the Subordinate Judge is correct. A reference to the history and constitution of *Mauza Dheriala Saigan*, in which the parties reside and in which the land in dispute is situate, shows that this village was founded a very long time ago by the ancestors of Brahmins, *got Saigan*; that from the date of its foundation the majority of the proprietors have been Brahmins of this *got*; that since the first regular settlement the village has consisted of two *tarafs*, *taraf Brahminan* and *taraf Zimindaran*; and that the Brahmins have from the very beginning constituted a compact village community. The evidence of

(1) 94 P. R. 1907 (*Ram Chand v. Thakar Das*).

(2) 125 P. R. 1908 (p. 569) (*Hira Nand v. Hari Chand*).

(3) 56 P. R. 1909 (*Devi Ditta v. Dropti*)

(4) 87 P. R. 1909 (*Dalo v. Mohlu*).

(5) 34 P. R. 1911 (*Daswandi v. Mahant. Krishen Dev*).

(6) 1 P. R. 1910 (*Mussammatt Maya v. Gurdit Singh*).

(7) (1912) 13 Indian Cases 709 (*Fakir Chand v. Ram Chand*).

(8) 23 P. R. 1909 (*Kishan Chand v. Taj-ud-din*).

the Patwari shows that of the total area of the village, 1,265 *ghumrons*, *taraf* Brahminan comprises 707 *ghumrons* and *taraf* Zimindaran 543 *ghumrons*. There are four Lambardars of the village, of whom three are Brahmins and one a Muhammadan, the latter being Lambardar of *taraf* Zimindaran. The Patwari also says that the population is about 800 or 900 souls, of whom 600 or 700 are Brahmins. It is also in evidence that there is no *birt* in this village, and that the Brahmins do not perform any priestly functions, though a good many of them have taken to service. It appears that such of the Brahmin proprietors as are not in service depend for their livelihood entirely upon agriculture, and that the income of those who are in service is supplemented by their income as landowners. It is further shown that, so far as regards the rules of succession, the Brahmins of this village are not governed by Hindu Law, as among them admittedly daughters are excluded from inheritance by collaterals.

In view of the facts stated above, it seems to me that the initial presumption, that the parties in this case being Brahmins were governed by Hindu Law, and not by custom, has been sufficiently rebutted, and that the *onus* has been shifted on to the party who asserts that in matters of alienation the Brahmins of this village are governed by their personal law. The appellant's pleader has cited No. 94 *P. R.* 1907 (1), 125 *P. R.* 1908, p. 569 (2), 56 *P. R.* 1909 (3), 87 *P. R.* 1909 (4), 63 *P. R.* 1910 (5), and 34 *P. R.* 1911 (6). On the other hand, the respondents' pleader has relied mainly on 125 *P. R.* 1908 (2), 1 *P. R.* 1910 (7), and Second Appeal 926 of 1910 decided by this Court on the 9th February 1912 (13 Indian Cases, p. 709) (8). I have carefully considered all these rulings and it seems to me that the facts, which have been proved, in the present case, fully justify the conclusion that the Brahmins of *Mauza Dheriala Saigan* are governed by custom, and not by Hindu Law, and that in matters of alienation their powers are subject to the same restriction as those of agricultural tribes in other parts of the Rawalpindi district. In regard to cases relating to agricultural land owned by Brahmins in this Province, I agree with the observations of Johnstone, J., in 63 *P. R.* 1910 (5),

(1) 94 *P. R.* 1907 (*Ram Chand v. Thakar Das*).

(2) 125 *P. R.* 1908 (p. 569) (*Hira Nand v. Hari Chand*).

(3) 56 *P. R.* 1909 (*Devi Ditta v. Dropti*).

(4) 87 *P. R.* 1909 (*Dalo v. Mohlu*).

(5) 63 *P. R.* 1910 (*Bishen Das v. Ram Dhan*).

(6) 34 *P. R.* 1911 (*Daswandi v. Mahant Krishen Dev*).

(7) 1 *P. R.* 1910 (*Mussammât Maya v. Gurdit Singh*).

(8) (1912) 13 *Indian Cases* 709 (*Fakir Chand v. Ram Chand*).

"that ordinarily one most important test is, whether the Brahmins in question are a compact village community or at least a compact section of the village community? In such cases there is a strong presumption in favour of custom."

For the reasons given above, I hold that the parties in this case are governed by custom, and not by Hindu Law, and that the sale in dispute, so far as it relates to ancestral land, must be held to be invalid unless it is shown to have been made for consideration and legal necessity. Both the Courts below have found that full consideration passed under the sale in question; but whereas the Subordinate Judge has held that of the consideration money only Rs. 600 was raised for legal necessity, the Divisional Judge has not dealt with this point because, upon his view of the case the question of legal necessity for the sale did not arise at all.

Holding, as I do, that legal necessity for the sale of the ancestral land must be proved, I must accept this appeal and, setting aside the decree of the Divisional Judge, I send the case back under order XLI, rule 23, Civil Procedure Code, for a decision of the question as to how much of the sale consideration was covered by legal necessity in this case. The appellant will get his costs in this Court against the contesting respondents.

Appeal accepted.

No. 24.

Before Hon. Mr. Justice Shah Din.

RAM LAL—(PLAINTIFF)—APPELLANT

Versus

GOPI—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1321 of 1913.

Custom—alienation—Brahmons of Mauza Dangoh Khurd, Una tahsil, Hoshiarpur district—Hindu Law.

Held, that in matters of alienation a childless Brahman, proprietor of Mauza Dangoh Khurd in the Una tahsil of the Hoshiarpur district, is governed by agricultural custom, and not by Hindu Law.

Held also, that a rule of custom may be established and held to be of binding force, even where no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it, and likely to know of its existence, in its favour.

55 P. R. 1903 (F. B.) (p. 234) (1) and 110 P. R. 1906 (F. B.) (p. 393) (2), cited and followed.

31 P. R. 1911 (3), referred to.

1) 55 P. R. 1903 (F. B.) (p. 234) (*Jowala v. Hira Singh*).

2) 110 P. R. 1906 (F. B.) (p. 393) (*Daya Ram v. Sobel Singh*).

3) 34 P. R. 1911 (*Daswandi v. Mahant Krishen Dev*).

Further appeal from the decree of J. P. Thompson, Esquire, Divisional Judge of the Hoshiarpur Division, dated the 19th May 1910.

Tek Chand, for appellant.

Umar Bakhsh, for respondent.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—The facts of this case are very fully stated in the judgment of the learned Divisional Judge. The questions for decision in this appeal are :— 1st July 1913.

- (1) Whether the parties entered into a compromise before the local commissioner, who was appointed by the Munsif, to make an inquiry into the question of custom that arises in this case, and whether they are not bound by that compromise ? and
- (2) If the parties have not settled the case by compromise, whether, in matters of alienation of ancestral land, a childless Brahman proprietor of *Mauza Dangoh Khurd* in the *Una tahsil* of the Hoshiarpur district, is governed by agricultural custom or by Hindu Law ?

On the first question, I agree with the Divisional Judge that the statements made by the parties in the first Court on the 17th July 1909, clearly show that the alleged compromise arrived at between them before the local commissioner three days previously was not considered by them as of binding effect, as we find the plaintiff stating on the said date that, if the defendant chose to repudiate the compromise, the Court was at liberty to give its decision on the merits of the case, and that he (the plaintiff) would sue the defendant to recover from him the sum of Rs. 70 which he had paid him in accordance with the compromise. The defendant repudiated this compromise altogether and said that he had been forced by the local commissioner to accept the terms thereof. In these circumstances, I hold that the case was not settled by the parties by a lawful compromise, and the Divisional Judge was, therefore, right in deciding the appeal on the merits.

The second question set out above is a most important question in the case. Upon that question the Munsif held that the parties were governed by custom, and not

by Hindu Law, and that therefore the plaintiff had a right to contest the sale made by Jai Karan in favour of the defendant in 1889. He accordingly decreed the plaintiff's claim conditionally on his paying Rs. 70 to the defendant. The Divisional Judge, on the other hand, held that the parties were governed by Hindu Law, and not by custom, and he therefore accepted the appeal and dismissed the plaintiff's suit.

After hearing arguments on both sides and referring to the record, I think that the view taken by the Munsif is correct. A reference to the history of the village shews that its original owners were Brahmans of the Raru gôt, and that, some four generations ago, Brahmans of the Dogra gôt, to which the parties belong, came from Pirthipur, a village close by, and acquired land in *Mauza Dangoh Khurd* from the original Raru owners. The whole of the village is owned by Brahmans of these two gôts, 135 *ghumaons* belonging to Raru Brahmans and 52 *ghumaons* to Brahmans of the Dogra gôt. The parties still reside at village Pirthipur, which is a Rajput village in which there are only twelve families of Brahmans belonging to seven different gôts, of which two families are of the Dogra Brahmans, one of them being the parties' family. In Pirthipur the Brahmans have no share in the *shamilat*; while in village Dangoh Khurd, in which the land in suit is situated, the Brahmans own the *shamilat* as well as the whole of the *kheewat* land. The Brahmans of Raru gôt in Dangoh Khurd constitute a compact village community and the Brahmans of the Dogra gôt, who own and cultivate agricultural land in this village, although they live at Pirthipur, are, to all intents and purposes, members of the same community. It is not denied that, except some well-to-do persons, all the Brahmans of the Dogra gôt till the soil with their own hands; that they do not, so far as the evidence on the record goes, carry on any priestly functions; and that among them daughters do not succeed to their father's property in the absence of sons, as they would succeed if this class of Brahmans were governed by Hindu Law. The local Commissioner, Sant Ram, who made the inquiry into custom on the spot, is a Rajput Zaildar who belongs to the principal village of the Punjab *Ilaka* in which Dangoh Khurd is situated; and he has examined no less than sixty witnesses—all Brahmans, who reside in seventeen different villages in that tract. With the exception of five or six witnesses produced by the defendant, all of them have unanimously stated that the parties, as well as Brahmans of other gôts inhabiting the Punjab *Ilaka* in the *Una tahsil*, follow

agricultural custom, and not Hindu Law ; and the local commissioner has accepted their evidence on this point as correct and has reported accordingly. As observed by Chatterji, J., in No. 55 P. R. 1903 (F. B.) (at page 234) (1) :—" A rule of " custom may be established and held to be of binding force even " where no instance is forthcoming, if there is an overwhelming " preponderance of oral testimony of those governed by it and " likely to know of its existence in its favour....." Similar observations are to be found in No. 110 P. R. 1906 (F. B.) at page 393 (2):—" The proof of custom should not be " confined merely to judicial precedents and definite instances, " but might consist in the deliberate and well-considered opinion " of the people living under, and governed by, the custom and " in other recognized modes of establishing its existence." I entirely agree in these observations ; and it seems to me that the unanimous testimony of no less than fifty-four witnesses, who are all Brahmans, and who have stated on oath that the Brahmans of the tract in which they live are governed by custom, and not by Hindu Law, is entitled to very great weight ; and the matter is practically clinched when we find that among the Brahmans with whom we are concerned in this case, daughters are admittedly excluded from inheritance by their fathers' collaterals. It is not proved that in the village of Dangoh Khurd any alienations of ancestral land have been made by childless Brahmans of the Dogra gôt to the prejudice of their agnates ; and under all the circumstances of this case it must be held that the parties are governed by custom, and not by Hindu Law. The *onus*, therefore, lay on the defendant of proving that the sale in dispute was valid by custom and I am clear that he has failed to discharge that *onus*. The Dharmisal case, to which the Divisional Judge has referred in his judgment and on which he has placed much reliance is the one reported as No. 34 P. R. 1911 (3), and, as will be seen from the report, the decision of this Court, which reversed the judgment and decree of the learned Divisional Judge in that case, is entirely in favour of the plaintiff.

For the reasons given, I accept this appeal and, setting aside the decree of the Divisional Judge, I restore that of the Munsif with costs throughout.

Appeal accepted.

(1) 55 P. R. 1903 (F. B.) (p. 234) (*Jowala v. Hira Singh*).

(2) 110 P. R. 1906 (F. B.) (p. 393) (*Daya Ram v. Soheli Singh*).

(3) 34 P. R. 1911 (*Daswandi v. Muanil Krishen Dev*).

No. 25.

Before Hon. Mr Justice Johnstone and Hon.
Mr. Justice Shah Din.

PUNNA LAL—(PLAINTIFF)—PETITIONER
Verus
SETH COWSI AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Revision No. 435 of 1911.

Revision (Civil)—conduct of petitioner shewing acquiescence in the order objected to—refusal of Chief Court to exercise its revisional jurisdiction—conflict of rulings as to admissibility of remedy on revision where petitioner has another remedy by way of appeal from the final decree.

An *ex-parte* decree was passed against the defendant-respondent in the case and they applied to have it set aside. The District Judge passed an order on 6th December, setting aside the *ex parte* decree conditional on the respondents paying to the plaintiffs-petitioners Rs. 25 by way of cost. The costs were paid on the 7th December and received by petitioner without protest. On the 8th plaintiff-petitioner put in his replication to the respondent's pleas. On 10th December the case was made over to the Sub-Judge for trial and on the 14th that Court appointed a commissioner to go through the accounts of the parties and report thereon, on the 6th February 1911 the petitioner filed the present petition for revision.

Held, that the petitioner's conduct after the order of the 6th December shewed that he did not consider himself materially prejudiced by the order and taking into consideration the delay in filing this petition the Chief Court was justified in declining to exercise its revisional jurisdiction in favour of the petitioner.

The conflict in the rulings 125 P. R. 1892 (1) and I. L. R. 34 All. 592 (2) on the one hand and I. L. R. 22 Cal. 981 (3), 9 Cal. W. N. 584 (4) and I. L. R. 25 All. 280 (5) on the other, pointed out.

Petition for revision of the order of Mirza Zafar-Ullah Khan, District Judge, Sialkot, dated the 6th December 1910.

Badar-ud-Din, for petitioner.

Tirath Ram, for respondents.

The judgment of the Court was delivered by—

24th Oct. 1913.

SHAH DIN, J.—This is a petition for revision under section 70 (1) (a) of the Panjab Courts Act, 1884, as amended by

(1) 125 P. R. 1892 *Hassan Ali Shah v. Salig Ram*.
(2) (1912) I. L. R. 34 All. 592 *Nand Kew v. Bhopal Singh*.
(3) (1895) I. L. R. 22 Cal. 981 *Chintamony Dass v. Raghoonath Sahoo*.
(4) (1905) 9 Cal. W. N. 584 *Krishna Chandra Goldar v. Moheshchandra Saha*.
(5) (1903) I. L. R. 25 All. 280 *Tasadduq Husain v. Hayat-un-Nissa*.

Act XXV of 1899. The facts which are material to the decision of the revision are briefly these :— On the 22nd April 1909 the petitioner brought a suit in the Court of the District Judge, Sialkot, against the respondents for recovery of Rs 1,461-3-4. The respondents did not put in an appearance, and an *ex parte* decree was passed in favour of the petitioner against them on the 6th December 1909. On the 5th December 1910 the respondents applied to the District Judge for an order to set aside the *ex parte* decree. On the 6th December 1910 the said application was accepted and the *ex parte* decree was set aside by the District Judge conditional on the respondents paying to the petitioner Rs. 25 by way of costs. The respondents paid in the amount of costs on the 7th December and filed a written statement in answer to the plaintiff's claim. The petitioner received the costs without protest, and on the 8th December he put in his replication to the respondents' pleas. On the 10th December the case was made over to the Sub-Judge, Sialkot, for trial. On the 14th December the Court appointed a Commissioner to go through the accounts of the parties and to submit a report.

The present petition for revision was filed in this Court on the 6th February 1911 and was admitted to a hearing in Chambers on the 22nd March 1911.

Before the learned Chief Judge a preliminary objection was raised on behalf of the respondents, on the authority of No. 125 P. R. 1892 (1), that no revision lay in this Court; and in view of the importance of certain questions of law connected with the preliminary objection the petition for revision has been referred to a Division Bench for disposal.

Lala Tirath Ram on behalf of the respondents has urged before us that since it would be open to the petitioner, in an appeal from the final decree which might be passed by the Lower Court against him in this case, to question the correctness or propriety of its order of the 6th December 1910 setting aside the *ex parte* decree of the 6th October 1909, it is not competent to him to come up to this Court on the revision side at this stage of the litigation with a prayer asking that the order of the 6th October 1909 be set aside, and in support of this contention he has relied on 125 P. R. 1892 (1), and I. L. R. 34 All. 592 (2). He has further contended

(1) 125 P. R. 1892 (*Hassan Ali Shah v. Salig Ram*).

(2) (1912) I. L. R. 34 All. 592 (*Nand Ram v. Bhopal Singh*).

that even if a revision did lie¹ in this Court, in view of the conduct of the petitioner in the Court below in acquiescing in the order under revision by accepting from the respondents Rs. 25 as costs and by filing his replication to their pleas, his petition for revision should not be entertained by this Court.

In connection with the first contention there appears to be a conflict of authority. Mr. Badr-ud-Din for the petitioner relies, in support of his position that under the circumstances of this case a revision does lie in this Court, on *I. L. R. 22 Cal. 981* (1), *I. L. R. 9 Cal. W. N. 584* (2), and *I. L. R. 25 All. 280* (3), and these authorities would seem to lay down a rule of law different from that laid down in the decisions cited by the respondents' pleader. It is, however, unnecessary for us to consider the correctness or otherwise of the contention thus raised, for, in our opinion, the second contention of the respondents' pleader that in any case this petition for revision should not be entertained by this Court has much force and must prevail. The petitioner's conduct after the order of the 6th December 1910, in accepting Rs. 25 as costs from the respondents without protest and in filing his replication to their pleas and in otherwise acquiescing in the orders subsequently passed by the Court below in the course of the suit shows that he did not consider himself materially prejudiced by the said order of the 6th December 1910, and it is noteworthy that it was not until the 6th February 1911 that he filed the present petition for revision in this Court. We think that in these circumstances this Court should not exercise its revisional jurisdiction, which is intended to be exercised only in exceptional cases, in favour of the petitioner. We accordingly accept the preliminary objection and decline to go into the question of the correctness or propriety of the order of the 6th December 1910. The petition is dismissed with costs.

Appeal dismissed.

(1) (1895) *I. L. R. 22 Cal. 981* (*Chintamony Dass v. Raghoo Nath Sahoo*).

(2) 1905 *I. L. R. 9 Cal. W. N. 584* (*Krishna Chandra Goldar v. Mohesh Chandra Saha*).

(3) (1903) *I. L. R. 23 All. (Tasaddug Husain v. Hayat-un-Nissa)*.

No. 26.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.
Mr. Justice Beadon.

AMIR SHAH AND KAMIR SHAH—(DEFENDANTS)—
APPELLANTS

Versus

JETHA AND ANOTHER—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 477 of 1909.

Punjab Pre-emption Act, 11 of 1905, section 11, proviso—effect on rights of pre-emptor where vendee acquires a new status after date of sale.

On the 23rd October 1906 agricultural land was sold by an Arora proprietor to a Kureshi and on the 12th April 1907 the Kureshis were declared members of an agricultural tribe. In October 1907 plaintiff, an Arora of same tribe as vendee and a co-sharer in the *khata* comprising the land sold (Pre-emption Act, section 11, *proviso*), brought the present suit for pre-emption. It was contended that inasmuch as the vendee became a member of an agricultural tribe before the date of suit he acquired a right of pre-emption at least equal to that of the plaintiff, whose suit must consequently fail.

Held, following the ruling of the majority of the Full Bench in 90 P. R. 1909 (F. B.) (1), that the plaintiff must succeed by reason of the superiority of his position at the date of sale and his retention of the *status* on which his suit was based.

53 P. R. 1911 (2), distinguished.

Further appeal from the decree of Q. Q. Henriques, Esquire, Divisional Judge, Shahpur Division, dated the 2nd March 1909.

Muhammad Shafi, for appellants.

Morton and Ganpat Rai, for respondents.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—This is a suit for pre-emption. 31st Oct. 1913.
The vendor was an Arora, resident in a village, and the land sold was agricultural land. The purchaser was a Kureshi of the same village, was an agriculturist, and a co-sharer in the *khata* which comprised the land sold. The sale was effected on the 23rd of October 1906 and on the 12th April (the lower Appellate Court says the 2nd, but the 12th is recorded in Shadi Lal's Punjab Pre-emption Act) 1907, a notification was issued by the Punjab Government declaring Kureshis members of an agricultural tribe within the terms of the Act. The plaintiff was an Arora, a member of the vendor's tribe, and a co-sharer in the *khata* comprising the land sold. He consequently

(1) 90 P. R. 1909 (F. B.) (*Sanwal Das v. Gurparshad*).

(2) 53 P. R. 1911 (*Sundar Das v. Bajjan Singh*).

fulfilled the conditions of the proviso to section 11 of the Pre-emption Act and his and the vendor's tribe was not, and is not, an agricultural tribe within the terms of the Act.

A preliminary objection that no further appeal lay, by reason of the value, for purposes of jurisdiction, of the land in suit, at thirty years Government revenue, being less than Rs. 250, was overruled at the hearing. It is true that the Government revenue is only about Rs. 2-8-10, but the pre-emptive price was found by the lower Appellate Court to be Rs. 800, and this finding has not been contested before us, and 24 *P. R.* 1903 (*F. B.*) (1), is direct authority for holding that a further appeal lay.

The lower Appellate Court held that the plaintiff had at the date of sale a right of pre-emption, and that the purchaser had at that time no right, and decreed the suit. Counsel for the purchaser-appellant contended that, inasmuch as the purchaser became a member of an agricultural tribe before the date of suit, he acquired a right of pre-emption at least equal to that of the plaintiff whose suit must consequently fail. The authorities cited for this proposition were all, with the exception of 53 *P. R.* 1911 (2), prior to 90 *P. R.* 1909 (*F. B.*) (3), in which a majority of the Full Court decided that the pre-emptive rights of the parties must be decided by their rights at the date of sale, provided that the position of a party had not been altered otherwise than by some improvement in the position of another party. The effect of this ruling is that the purchaser's acquisition of a right of pre-emption, equal or superior to that of the plaintiff, after suit but prior to decree, has not the effect of depriving the plaintiff of the benefit accruing to him from the superiority of his right at the date of sale, provided that he has not divested himself of that right or been deprived of it in some manner other than the acquisition of a right independently of him or of the property on the ownership of which his right is based.

53 *P. R.* 1911 (2), does not help the appellant, the facts and *ratio decidendi* being clearly distinguishable. In that case the person, who asserted his right of pre-emption privately, after institution of the plaintiffs' suit and acquired the property from the purchaser, had at the date of the sale in respect of

(1) 24 *P. R.* 1903 (*F. B.*) (*Ghulam Ghaus v. Nabi Baksh*).

(2) 53 *P. R.* 1911 (*Sundar Singh v. Sajjan Singh*).

(3) 90 *P. R.* 1909 (*F. B.*) (*Sanwal Das v. Gurparshad*).

which a suit was filed a right of pre-emption equal to the plaintiffs' right. 90 P. R. 1909 (F. B.) (1), was not referred to in 53 P. R. 1911 (2), obviously in consequence of the distinction between the facts of the two cases.

The plaintiff must succeed by reason of the superiority of his position at the date of sale and his retention of the *status* on which his suit was based, and the appeal fails and is dismissed with costs.

Appeal dismissed.

No. 27.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.
Mr. Justice Beadon.*

JOT RAM AND OTHERS—(PLAINTIFFS)—APPELLANTS

Versus

HARDAWARI AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 558 of 1909.

Custom—succession to property of adopted son—over which his adoptive father had an absolute power of disposal—rights of collaterals of adoptive father.

Held, that the principle of reversion to the heirs of the donor or appointer is limited to property over which he had not unrestricted power of disposition, and that consequently the collaterals of the appointer could not succeed to the land of the appointed heir (on the latter's death without lineal descendants) where such land was not ancestral.

12 P. R. 1892 (F. B.) (3), 117 P. R. 1906 (4), 88 P. R. 1906 (5), 63 P. R. 1912 (6), 94 P. R. 1913 (7) and Rattigan's Digest, article 55, referred to.

Further appeal from the decree of H. Scott-Smith, Esquire, Divisional Judge, Ferozepore Division, dated 15th February 1909.

Badr-ud-Din Kureshi and Gokal Chand, for appellants.

Manohar Lal, for respondents.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—This is a suit by the collaterals of one DIALA for agricultural land left by him. The case for the 31st Oct. 1913.

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- (1) 90 P. R. 1909 (F. B.) (*Sanwal Das v. Gurparshad*).
 - (2) 53 P. R. 1911 (*Sundar Das v. Sajjan Singh*).
 - (3) 12 P. R. 1892 (F. B.) (*Sita Ram v. Raja Ram*).
 - (4) 117 P. R. 1906 (*Gurditta v. Atar Singh*).
 - (5) 88 P. R. 1906 (*Punjab Singh v. Khazan Singh*).
 - (6) 63 P. R. 1912 (*Sant Singh v. Sadda*).
 - (7) 94 P. R. 1913 (*Ratia v. Wariam Singh*).

plaintiff-appellants is that the land in suit was ancestral ; that one Lachman was placed in possession of the land as adopted son by Diala's widow ; that Lachman died within twelve years of suit, and that the appellants were entitled, as collaterals of Diala, to the land on the death of Lachman without lineal descendants on the principle that they were Lachman's collaterals *qua* the land in suit.

We concur in the reasons recorded by the learned Divisional Judge for holding, on appeal, that the land in suit was not ancestral. The oral evidence, that the land was ancestral, *i.e.*, that it came from Amru, common ancestor of the appellants and Diala, is worthless and was not seriously relied on at the hearing, and the pedigree-table and specification of shares of the 1843 settlement satisfy us that Diala did not inherit the land in suit from Amru, and that it was acquired by him.

The learned Divisional Judge was not justified, on the pleadings, in holding that Lachman was not the adopted son of Diala, the defence set up by the respondents having been that Diala adopted Lachman, but the suit fails on the finding that the property in suit was not ancestral in the hands of Diala.

The parties are governed by agricultural custom, and the so-called adoption was the customary appointment of an heir.

The rule laid down in article 55 of Rattigan's Digest of Customary Law, that the estate inherited by the appointed heir from the appointer goes to the natural heirs of the appointed, if it consist of property over which the appointer had an absolute power of disposal, is ordinarily followed and is supported by authority. 12 *P. R. (F. B.)* 1892 (1), in which it was held that the natural collaterals of the appointed heir did not succeed to property inherited by him from the appointer, dealt with ancestral property—at page 62 of the report this passage occurs :—“ The general principle which regulates succession to “ ancestral land in a Punjab village, &c.” 117 *P. R.* 1906 (2), obviously dealt with ancestral property, following the Full Bench ruling above cited.

In that Full Bench ruling in 88 *P. R.* 1906 (3), and at pages 343—1 of the report of 94 *P. R.* 1913 (4), a distinction was drawn between the rules of inheritance to the property which

(1) 12 *P. R.* 1892 (*F. B.*) (*Sita Ram v. Raja Ram*).

(2) 117 *P. R.* 1906 (*Gurdiitta v. Attar Singh*).

(3) 88 *P. R.* 1906 (*Punjab Singh v. Khazan Singh*).

(4) 94 *P. R.* 1913 (*Ralia v. Wariam Singh*).

an appointed heir inherits or takes from the appointer, and to his own self-acquired property.

In 63 P. R. 1912 (1), it was held that an adoption, the validity of which was doubtful, had the same effect as a gift, in respect of the self-acquired property of the adoptive childless proprietor, whose collaterals were consequently not entitled to possession of that property.

There is a wide distinction between succession to ancestral property and succession to self-acquired, and no authority for applying to the right of the collaterals of the donor or appointer to property which was not ancestral in his hands, the rules regulating their right to his ancestral property, has been cited. The principle of reversion to the heirs of the donor or appointer is limited to property over which he had not unrestricted power of disposition.

Counsel for the appellants was, indeed, constrained to admit that special custom must be established before the appellants can establish their right to any of the property of DIALA which was not held by Amru.

The issues framed gave the appellants ample opportunity of adducing any available evidence of such custom, and we see no reason for a remand for that purpose. Issues were framed on the 9th of June, the next hearing was on the 3rd of July, and the appellants closed their case that day without suggesting the desire to adduce further evidence.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 28.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and
Hon. Mr. Justice Beadon.*

WALI MUHAMMAD AND OTHERS—(DEFENDANTS)—
APPELLANTS

Versus

BAHAWAL BAKHSI AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 271 of 1910.

*Civil Procedure Code, Act V of 1908, schedule II, clauses 17-19—
reference to arbitration made by Court—appeal from decree—revision.*

The parties having referred their dispute to certain arbitrators plaintiff-respondent made an application to have the award filed. It was subsequently

found that the award was defective and on this the parties having agreed to abandon the reference to the original arbitrators made a joint application to the Court appointing certain other arbitrators and praying that the Court would direct these new arbitrators to file an award and the Court made the necessary order and eventually passed a decree in accordance with the award.

Held, that although the subsequent joint application to the Court was not numbered and registered as a newly instituted suit (as it should have been) the award was made on a reference by the Court (*vide* Civil Procedure Code, schedule II, clauses 17-19) and consequently no appeal was competent against a decree made in accordance with it.

9 P. R. 1913 (1), followed.

Held also, that the existence of certain immaterial irregularities in the proceedings was not sufficient ground for interference on revision.

First appeal from the decree of Izzat Nishan Nawab Malik Khuda Bakhsh Khan, District Judge, Gujrat, dated the 31st January 1910.

Shadi Lal, for appellants.

Sheo Narain, for respondents.

The judgment of the Court was delivered by—

1st Nov. 1913.

BEADON. J.—Counsel for the respondents has urged a preliminary objection that no appeal lies.

The parties having referred their dispute to certain arbitrators, the plaintiffs-respondents made an application to have the award filed. This application was one under clause 20 of the second schedule of the Code of Civil Procedure and, in accordance with paragraph 2 of that clause, it was duly numbered and registered as a suit between the parties.

The filing of the award was contested, and when the arbitrators were summoned to Court, it was found that the document purporting to be an award was defective and could not take effect as an award.

On this the parties, having agreed to abandon the reference to the original arbitrators, made a joint application to the Court appointing certain other arbitrators, and praying that the Court would direct these new arbitrators to file an award, and would appoint an umpire in the event of the arbitrators being unable to agree.

The Court then referred the matter to the arbitrators named in the application and fixed a time, which was subsequently extended, in which the award was to be delivered.

The arbitrators, who were unanimous in their decision, filed an award and the Court, after hearing and disposing of objections, passed a decree in accordance with the award.

In 9 P. R. 1913 (1), it was held that the right of appeal allowed by section 104 (1) (f) of the Code of Civil Procedure is confined to cases referred to in clauses 20 and 21 of the second schedule of the Code and is not applicable to cases falling under clauses 17 to 19.

Counsel for the appellants, while admitting that there can be no appeal unless the case falls within clauses 20 and 21, contends that the present case falls within these two clauses.

It is true that the original application was not rejected when the award was found to be defective, and it is also true that the subsequent application, on which the matter was referred to new arbitrators, was not numbered and registered as a newly instituted suit. But, though these irregularities could, and should, have been avoided by the District Judge, the fact remains that the award, in accordance with which a decree has been passed, was made on a reference by the Court, and it is obviously not the result of arbitration without the intervention of the Court.

The District Judge, in disposing of objections to the award, referred only to clauses 14 and 15 of the schedule, but this does not necessarily indicate that he was acting under clause 21. There was no ground for action under clause 12 and clauses 14 and 15 also apply to proceedings under clauses 17 to 19. As a matter of fact, the District Judge, in requiring the payment of Court-fees, amounting to Rs. 10, made it clear that he treated the application on which the reference was made as one under clause 17.

We find, therefore, that the award was made on an order of reference by the Court on an agreement by the parties to refer to arbitration, that clauses 17 to 19 apply, and that no appeal lies.

Counsel has urged that, if no appeal lies, there are grounds for interference on revision, namely :—

(1) that no final order was passed on the original application and the subsequent application was not numbered and registered as a suit ;

(2) that the Court was wrong in rejecting the objections to the award ;

(3) that the award was made after the period allowed for delivery of the award and consequently the award is void ; and

(4) that in the order of reference the District Judge omitted to appoint an umpire.

As regards (1), the District Judge's procedure, as already noticed, was irregular in this respect, but the procedure was acquiesced in by the parties, and the irregularity, which did not affect the merits of the case is not material.

As regards (2), the Court duly heard and disposed of the objections on the merits and there was no irregularity.

As regards (3), the award was delivered on 18th August 1909 and, relying on *I. L. R. 13 All. 300 (P. C.)* (1), Counsel contends that it is void on the ground that the time for delivery of the award was not extended beyond the 16th August 1909. We, however, cannot accept the contention that the time was not extended to the 18th August 1909. In the District Judge's order of the 16th August the words "the award be waited for" show that the District Judge intended to, and did in fact, extend the time to the 18th August 1909.

As regards (4), the arbitrators were unanimous, and as there was thus no need for the services of an umpire, the irregularity is not material.

We can find no sufficient ground for interference on revision and, as no appeal lies, we dismiss the appeal with costs.

Appeal dismissed.

No. 29.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon. Mr. Justice Beadon.

BHAGAT SINGH—(DEFENDANT)—APPELLANT

Versus

SHER SINGH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 918 of 1909.

Custom—alienation—ancestral land—gift to daughter's son—Gil Jats—Tahsil Dasuya, Hoshiarpur District—suit for possession by collaterals after death of donor's widow—Limitation—Indian Limitation Act, IX of 1908, article 141—Punjab Limitation Act, I of 1900—Res judicata.

The suit was by reversioners for possession of ancestral land owned by one B. S. against the latter's daughter's son, who was in possession as donee

[1] (1891) *I. L. R. 13 All. 300 (P. C.)* (*Raja Hanarain Singh v. Chaudhrai Bhavani Kuar*).

of B. S. under a gift, dated 18th February 1887. B. S. died on 8th March 1894, his widow died on 7th November 1908 and this suit was instituted on 19th December 1908. In 1894 the present plaintiffs had brought against the present defendant and the widow of B. S. a suit for a declaration that a gift of another portion of B. S.'s property to the said defendant would not affect the reversioners' rights, which was finally decreed by the Chief Court. In that suit the defendant did not press his present plea that he was a *khana damad*.

Held, that the suit was governed by article 141 of the Limitation Act, and not by the Punjab Limitation Act of 1900, and was consequently within time.

90 P. R. 1904 (F. B.) (1), 145 P. R. 1907 (2), 33 P. R. 1911 (F. B.) (3), followed.

62 P. R. 1910 (4), referred to.

Held also, that the plea of *khana damadi* not having been pressed in the previous suit between the parties, must be treated as having been adjudicated on against the defendant-appellant.

Held further, that defendant-appellant had failed to prove that by the custom governing Gil Jats of *Tahsil Dasuya*, Hoshiarpur District, a gift of ancestral property, in favour of a daughter's son, was valid in presence of near collaterals.

116 P. R. 1894 (5), 15 P. R. 1886 (6), 107 P. R. 1887 (F. B.) (7), 92 P. R. 1904 (8), 85 P. R. 1889 (9), 85 P. R. 1900 (10), 61 P. R. 1909 (11) and *Roe and Rattigan's Tribal Law*, pp. 112 and 113, referred to and distinguished.

First appeal from the decree of A. Latif, Esquire, District Judge, Hoshiarpur, dated the 5th July 1909.

Lajpat Rai, for appellant.

Shadi Lal, for respondents.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—This is a suit by reversioners for possession of ancestral land, owned by one Baisakha Singh, against Bhagat Singh, son of Baisakha Singh's daughter, who was in possession as donee of Baisakha Singh. February the 18th, 1887, is the date of the alleged gift. Baisakha Singh died on the 8th of March 1894, his widow, Mussammat Atro, died on the 7th November 1908, and this suit was instituted on the 19th of December 1908. 3rd Nov. 1913.

- (1) 90 P. R. 1904 (F. B.) (*Sahib Dad v. Rahmat*).
- (2) 145 P. R. 1907 (*Miran Bakhs v. Ahmad*).
- (3) 33 P. R. 1911 (F. B.) (*Khiali Ram v. Gulab Khan*).
- (4) 62 P. R. 1910 (*Sohnu v. Labha*).
- (5) 116 P. R. 1894 (*Narain Singh v. Gurnukh Singh*).
- (6) 15 P. R. 1886 (*Hira Singh v. Ram Ditta*).
- (7) 107 P. R. 1887 (F. B.) (*Gujar v. Sham Das*).
- (8) 92 P. R. 1904 (*Punnu Khan v. Sandal Khan*).
- (9) 85 P. R. 1889 (*Gopal Singh v. Kheman*).
- (10) 85 P. R. 1900 (*Deri Ditta v. Mussammat Hukmi*).
- (11) 61 P. R. 1909 (*Ralla v. Jawahir Singh*).

The first question for consideration is, whether the suit was within time, *i.e.*, whether it was governed by Article 141 of the Limitation Act or by the Punjab Limitation Act of 1900 ? 90 *P. R.* 1904 (*F. B.*) (1), 145 *P. R.* 1907 (2), and 33 *P. R.* 1911 (*F. B.*) (3), are authorities for holding that article 141 applies, and that the suit, instituted six weeks after the widow's death, was within time. 62 *P. R.* 1910 (4), is not on all-fours with the present, case, but 145 *P. R.* 1907 (2), was followed in it.

The next question for consideration is, whether the gift was valid against the reversioners ? In this suit the plea, that the appellant's father was *khana-damad* of Baisakha Singh, has been taken, but it was not pressed in the suit instituted by the reversioners against the appellant and Baisakha Singh's widow in 1894. That was a suit for a declaration that a gift of another portion of Baisakha Singh's property to the appellant would not affect the reversioners' rights. It was decreed by a Division Bench of this Court and, inasmuch as the plea of *khana-damad* would, if established, have been a complete answer to the suit, it must be treated as having been adjudicated on against the appellant.

On appeal to this Court it was held that the present appellant had not established a custom authorizing Baisakha Singh to give him the property in suit in the presence of the then plaintiff, whose sons five of the present plaintiffs-respondents are. The appellant has signally failed in this suit to establish the custom set up, and the authorities relied on in support of the custom are not in point. 116 *P. R.* 1894 (5), dealt with a gift to an agnate. 15 *P. R.* 88; (6), did indeed deal with a gift to a resident son-in law, but was prior to 107 *P. R.* 1887 (*F. B.*) (7), in which it was held that the burden of establishing such a custom as is here set up was on the person who asserted its existence. 92 *P. R.* 1904 (8), dealt with a gift to a brother's son by a Muhammadan Rajput. The plea, that the gift is valid either by custom or by reason of appellant's father having been a *khanadam* of Baisakha Singh, therefore failed. The plea, that the suit fails, because a declaration in respect of the gift attacked in it was not

(1) 90 *P. R.* 1904 (*F. B.*) (*Sahib Dad v. Rahmat*).

(2) 115 *P. R.* 1907 (*Mian Bakhsh v. Ahmad*).

(3) 33 *P. R.* 1911 (*F. B.*) (*Khiali Ram v. Gulab Khan*).

(4) 62 *P. R.* 1910 (*Sohnu v. Labha*).

(5) 116 *P. R.* 1894 (*Narain Singh v. Gurmukh Singh*).

(6) 15 *P. R.* 1886 (*Hira Singh v. Ram Ditta*).

(7) 107 *P. R.* 1887 (*F. B.*) (*Gujar v. Sham Das*).

(8) 92 *P. R.* 1904 (*Punnu Khan v. Sandal Khan*).

included in the suit of 1894, also fails. The gift now in suit was effected more than six years before that suit was instituted and consequently could not be attacked in that suit for a declaration.

We concur with the Court below in holding that the oral evidence of acquiescence is worthless. The reversioners obviously sued for a declaration in respect of the second gift because Baisakha Singh's action made them realize that immediate steps must be taken and it would not be safe to await the widow's death. We are satisfied that the suit is not barred by acquiescence. *Roe and Rattigan's Tribal Law* (pp. 112 and 113), cited for the appellant, does not help him. The alienations declared therein to be valid were alienations to agnates. Of the additional authorities, cited for the appellant in reply to the respondent, 85 *P. R.* 1889 (1), dealt with a gift of about 40 *kanals* for the maintenance of a step-son, who had all his life lived in the donor's family and had for many years worked the land and managed the affairs of the donor. 85 *P. R.* 1900 (2), dealt with a gift of self-acquired property and of $\frac{1}{10}$ th of the donor's ancestral property in favour of daughters and was based on a special provision in the *Riwaj-i-am* of the Sialkot District. The record of the present case contains no reliable evidence of any services rendered by the appellant or his father to Baisakha Singh. 61 *P. R.* 1909 (3), dealt with a gift to a near agnate who is not actually heir of the donor in consideration of services rendered. These authorities obviously do not help the appellant.

The further plea that costs of the whole suit should not have been decreed, because 543 *kanals* were claimed and the suit was defended in respect of 94 *kanals* 15 *marlas* and half a house only, has, in our opinion, no force. The plaintiff-respondent was forced into Court and did not know what the defence would be.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 85 *P. R.* 1889 (*Gopal Singh v. Kheman*).

(2) 85 *P. R.* 1900 (*Devi Ditta v. Mussammatt Hukmi*).

(3) 61 *P. R.* 1909 (*Ralla v. Jawahir Singh*).

No. 30.

Before Hon. Mr. Justice Johnstone and Hon.

Mr. Justice Beadon.

DHANPAT RAI—(DEFENDANT)—APPELLANT

Versus

MUSSAMMT KAHAN DEVI AND OTHERS—(PLAINTIFFS)—
—RESPONDENTS

Civil Appeal No. 1036 of 1912.

Civil Procedure Code, 1908, section 104 (f) and schedule II, paragraphs 20 and 21—arbitration without intervention of Court—where award decides matters not referred to arbitration.

On agreement of the parties to refer to arbitration an award was delivered, but it decided certain matters which had not been referred to arbitration. On application under paragraph 20, schedule II of the Code of Civil Procedure, that the award be filed in Court, the Court held that the matters not referred to arbitration were separable from the rest of the award and passed a decree for the latter only.

Held, that paragraph 21, schedule II of the Code does not authorise a Court to file an award in part and to give effect to an award in part, and that the Court should have refused to file the award.

84 P. R. 1907 (1), I. L. R. 27 All. 526 (2), and I. L. R. 29 Mad. 303 (3), referred to.

15 Cal. L. J. 110 (4), distinguished.

Held also, that in proceedings under paragraphs 20 and 21, schedule II of the Code, a plea of acquiescence cannot be entertained.

First appeal from the decree of S. Wilberforce, Esquire, District Judge, Lahore, dated the 7th March 1912.

Shadi Lal and Tirath Ram, for appellants.

C. B. Petman and Sangam Lal, for respondents.

The judgment of the Court was delivered by—

4th Nov. 1913.

BEADON, J.—On the agreement of the parties to refer to arbitration, an award was delivered, but the award decided certain matters which had not been referred to arbitration.

The plaintiffs-respondents then applied to have the award filed and the application was numbered and registered as a suit under paragraph 20, schedule II of the Code of Civil Procedure.

In addition to other objections which were overruled, the defendant-appellant objected to the filing of the award on the ground that it decided matters not referred to arbitration, but the Lower Court, holding that these matters were separable

(1) 84 P. R. 1907 (*Bhagat Ram v. Paras Ram*).

(2) (1905) I. L. R. 27 All. 526 (*Mustafa Khan v. Phulja Bibi*).

(3) (1905) I. L. R. 29 Mad. 303 (*Thiruvengadathiengar v. Vaidinatha Ayyar*).

(4) (1910) 15 Cal. L. J. 110 (*Narsing Narain Singh v. Ajodhya Prasad Singh*).

from the rest of the award, passed a decree giving "effect to the award in so far as it deals with the matters which were referred to arbitration.

Though in appeal the defendant-appellant, under section 104 (f), Code of Civil Procedure, contests the order filing the award, the appeal also purports to be one from the decree itself, and on behalf of the respondents a preliminary objection was taken that the Memorandum of Appeal is insufficiently stamped. This objection, however, was abandoned when it was pointed out that the decree is merely declaratory, and that the Court-fee of Rs. 10 is sufficient for an appeal in a declaratory suit.

Paragraph 21, schedule II of the Code of Civil Procedure does not authorise a Court to file an award in part or to give effect to an award in part,—and 84 *P. R.* 1907 (1) is authority for holding that, in regard to arbitration without the intervention of the Court, the Court must refuse to file the award when it determines matters not referred to arbitration.

Counsel for the appellant has also cited *I. L. R.* 27 *All.* 526 (2) and *I. L. R.* 29 *Mad.* 303 (3) in support of the view that the Lower Court should have refused to file the award, and counsel for the respondents is constrained to admit that, in regard to arbitration without the intervention of the Court, the Court has ordinarily no power to amend the award. Reliance, however, is placed on 15 *Cal. L. J.* 110 (4) and it is contended that, in the circumstances of the present case, the Lower Court's order and decree are right.

In the case cited the defendant had not appealed and there was no question of setting aside the decree which had been passed and which, as far as it went, had been accepted by both parties. The plaintiff was seeking to have the remaining portion of the award included in the decree and it was held that, as the erroneous action of the arbitrator operated in favour of the defendant, it was not open to him to impeach that part of the award. The award was accordingly filed in its entirety; a decree was drawn up in accordance therewith; and thus the award was not amended but was wholly enforced.

In the present case, however, the appeal is by the defendant who has in no way submitted to the decree of the Lower Court, but continues to press his objection that the award cannot be

(1) 84 *P. R.* 1907 (*Bhagat Ram v. Paras Ram*).

(2) (1905) *I. L. R.* 27 *All.* 526 (*Mustafa Khan v. Phulja Bibi*).

(3) (1905) *I. L. R.* 29 *Mad.* 303 (*Thiruvengadathiengar v. Vaidinatha Ayyar*).

(4) (1910) 15 *Cal. L. J.* 110 (*Narsing Narain Singh v. Ajodhya Prasad Singh*).

filed and cannot be made the basis of any decree. Moreover, the award has not been wholly enforced and, as the portion of the award, which is outside the matter referred to arbitration, imposes certain duties and liabilities on the defendant, it is doubtful whether this part of the award can be said to be in the defendant's favour.

It has been urged that the defendant has acquiesced but, if this is so, the point is one which might be raised in a regular suit between the parties. It cannot be considered in proceedings under paragraphs 20 and 21, schedule II of the Code of Civil Procedure, in which the only points for consideration by the Court are :—

- (i) Whether or not the matter has been referred to arbitration ;
- (ii) Whether or not an award has been made ; and
- (iii) Whether or not any ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved.

In the present case a ground mentioned in paragraph 14 (a) has been proved, namely, that the award determines matters not referred to arbitration and, on the authority of 84 P. R. 1907 (1), it must be held that the award cannot be filed.

We accordingly accept the appeal and, setting aside the order and decree of the Lower Court, we direct that the application to file the award be dismissed. We think, however, that the case is one in which each party should pay its own costs throughout and we order accordingly.

Appeal accepted.

No. 31.

Before Hon. Mr. Justice Rattigan.

PEOPLE'S BANK OF INDIA, LIMITED—APPELLANT

Versus

NARAIN DAS AND OTHERS—RESPONDENTS.

Civil Appeal No. 2223 of 1913.

Indian Companies Act, VI of 1882, section 134—petition for compulsory winding up of a Banking Company—power of Court to appoint a provisional liquidator.

Held, that the power to appoint a provisional liquidator which is given to the Court by section 134 of the Companies Act is general and unqualified, but that this discretionary power must be exercised reasonably and in accordance with principles laid down by the Courts.

Held also, that where a Banking Company has to admit that it has in all its branches suspended business, and that it must inevitably go into liquidation, and that its only hope of salvation is that a new Company may be formed to take its place, such Banking Company is not merely "plainly and commercially" but also "technically" insolvent and a Court would be fully justified in taking action under section 134, and appointing a provisional liquidator, notwithstanding that the petition for compulsory winding up was opposed by the directors of the company concerned.

L. R. 2 Eq. Cases 231 (1), L. R. 3 Ch. App. 462 (2) and 14 W. R. (Engl.) 754 (3), referred to.

Miscellaneous first appeal from the orders of H. F. Forbes, Esquire, District Judge, Lahore, dated the 21st, 23rd and 27th of October 1913.

Beechey, for appellant.

Parker and Fazl-i-Hussain, for respondents.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—This is an appeal under section 169 of the Indian Companies Act (VI of 1882) from the orders of the District Judge, Lahore, dated 21st, 23rd and 27th October 1913. It appears, and is admitted before me, that on the 21st October last Messrs. Narain Das Bhagwan Das of Lahore presented a petition to the District Judge under sections 128 and 131 of the said Act praying that an order might be passed for the winding up by the Court of the People's Bank of India, a limited liability company duly registered under the Act, and that on the same date the petitioners, by a separate application, prayed for the appointment of a provisional liquidator under section 134. It was alleged in the former petition that the petitioners were creditors to the extent of Rs. 3,713-11-6, and that on the 19th of September 1913 the said Bank gave public notice to the effect that payment was stopped "till further instructions," and that the shareholders would consider the question of the winding-up of the Bank on the 30th September 1913. These allegations are admitted before me to be true, and Mr. Beechey, who appeared for the appellant-Bank at the hearing before me, also admitted, in answer to a question by me, that the numerous branches of the Bank had been directed by the management to issue similar notices.

In their petition for the compulsory winding-up of the Bank the petitioners made certain allegations against the

(1) (1866) *L. R. 2 Eq. Cases 231* (In re *London, Hamburg and Continental Exchange Bank (Emerson's Case)*).

(2) (1868) *L. R. 3 Ch. App. 462* (In re *Clifoden Benefit Building Society*).

(3) *14 W. R. (Eng.) 754 and 3 Mew's Digest, 1911* (In re *The Railway Finance Company, Limited*).

Directors of the Bank and in para. 8 stated that they believed that "the securities of the debtors of the said Bank are being diminished, and that the books and ledgers of the Bank are about to be dispatched to Bombay for audit; that these books, or some of them, might be lost in the way or disposed of otherwise," and they accordingly prayed "that the Bank be wound up by order of the Court, and that the Court be pleased to appoint an official liquidator and pass such orders as may be necessary and desirable to safeguard the interest of the creditors of the Bank."

As already observed, the petitioners further prayed, by a separate petition, for the appointment of a provisional liquidator.

Upon these petitions the District Judge directed (1) notices to issue to the Directors of the Bank; (2) the advertisement of the petition in the *Punjab Government Gazette* and certain specified newspapers; and fixed the 14th November 1913 for the hearing of the principal petition. He also appointed the head of the firm of Messrs. Neison, King and Company, Chartered Accountants of Lahore, as liquidator *ad interim*, conditional on the latter depositing security to the extent of Rs. 50,000. With reference to this latter part of his order, he directed notice to issue for the 23rd October. On the latter date the District Judge passed the following order:—

"Several contributories to the People's Bank have applied through various counsel to have the order appointing a provisional liquidator set aside. The main argument urged is that the contributories of the Bank are to hold a meeting on 26th October 1913 to decide on the action which should be taken; that at present a firm of auditors are engaged in inspecting the books of the Bank with a view to making a report to this meeting, and that, if the books be made over to the Official Liquidator, the auditors will be unable to present their report on that date.

"I understand from counsel that the head of Neison, King and Simson is not at present in Lahore. I accordingly adjourn until the 27th for his reply, and permit the auditors to continue their inspection until that date. I refuse, however, to change my order appointing an Official Liquidator. It is clear the Bank is in virtual liquidation since June last, as no half-yearly (balance sheet) for that six months has yet been issued, nor has the report of the accountants been published. There has been a long account of the meeting of the Bank's

contributories' on 30th September 1913 put on the file, but it contains no facts showing the Bank to be solvent. In any case a careful enquiry, such as the Official Liquidator will be compelled to make, will be in the interest of both contributories and creditors whatever the ultimate outcome of the petition for winding up may be."

The case came again before the District Judge on the 27th October when the following order was passed by him :—

" E. D. Dignasse is present with his partner A. Bangham. Mr. Dignasse is willing to accept the appointment of provisional Official Liquidator. I accordingly confirm Mr. Dignasse as provisional Official Liquidator with the following duties :—

(1) To take charge forthwith of the books, ledgers, etc., of the Bank, and to make an inventory of the same and to report how far Messrs. Ferguson have audited the accounts.

(2) To produce the last balance sheet, auditors' report and a report thereon.

(3) To audit the Bank's accounts from 1st July 1913 to date.

(4) To keep in readiness for production in Court all the papers that may be wanted.

At the request of Mr. Beechey appearing for the Bank Directors I grant permission to Messrs. Ferguson and Co. auditing the accounts to complete their audit under the supervision of the Official Liquidator. It is said the work will be completed in three or four days.

The usual order to issue to the Directors.

I leave the question of remuneration of the Official Liquidator undetermined at present.

The Official Liquidator should pay in all cash in possession of the Bank into the Bank of Bengal.

The People's Bank of India, Limited, have appealed to this Court, through Mr. Beechey, against the above orders of the District Judge appointing a provisional liquidator, and the sole question before me is, whether in the circumstances of the case, the District Judge acted reasonably and in accordance with recognized legal principles in making that appointment? This is the only question with which I have to deal and I desire to restrict any remarks that I may have to make and the decision which I have to give strictly to that one point. The main point at issue between the parties is to be

decided by the District Judge on the 14th instant and, as that question is not now before me, I wish it to be distinctly understood that I express no opinion with regard to it.

Section 134 of the Indian Companies Act, 1832, corresponds, *pro tanto*, with section 85 of the English Companies Act, 1862, and provides, *inter alia*, that the Court may also, at any time, “after the presentation of such petition” (*i.e.*, for winding up a company) “and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the Company.” Section 145 of the Indian Act (corresponding with section 96 of the English Act) further provides that “where an official liquidator is provisionally appointed” the Court may limit and restrict his powers by the order appointing him. It will be observed in this connection that the District Judge has, by his order of the 27th October, very effectually restricted the powers of the provisional liquidator.

The power to appoint a provisional liquidator which is given to the Court by section 134 is general, and, so far as the terms of the section go, absolutely unqualified. But this discretionary power must obviously be exercised reasonably and in accordance with principles laid down by the Courts. Company law is, more or less, in its infancy in this country and I have not been referred to any decision of a High Court or Chief Court in India bearing upon the point before me. On the other hand, there are several leading authorities reported in the English Law reports which enunciate the rules to be observed by the Court when it is called upon to appoint a provisional liquidator. The leading authority is *Emerson's Case* (1), and in his judgment in that case Lord Romilly, M. R., remarked:—“It is perhaps convenient that I should state what my practice is with reference to the appointment of a provisional liquidator. Where there is no opposition to the winding up, I appoint a provisional liquidator as a matter of course on the presentation of the petition. But when there is an opposition to it, I never do, because I might paralyse all the affairs of the Company and afterwards refuse to make the winding up order at all. But when the directors themselves apply or do not oppose the winding up then I appoint the provisional liquidator.” This rule of practice was subsequently approved by the Court of Appeal in *re Clifden Benefit Building Society* (2), and, so far as I

(1) (1866) L. R. 2 Eq. Cases 231 (In re London, Hamburg and Continental Exchange Bank (*Emerson's Case*)).

(2) (1868) L. R. 3 Ch. App. 462 (In re Clifden Benefit Building Society).

know, has been accepted ever since in England as correct. Mr. Beechey relies strongly upon these two authorities in support of his appeal and contends that the rule therein laid down is absolute and applies to every case when a petition for compulsory winding up is opposed by the directors of the company concerned.

I have carefully considered the cases cited and I need hardly add that I accept without hesitation the principle therein laid down. It seems to me, however, that those cases are not relevant to the facts admitted before me. In *Emerson's Case*, the question before the Master of the Rolls was, whether a certain transfer of shares was valid and binding, and it was with reference to that question that the learned Judge made the remarks which I have quoted from his judgment. These remarks I understand to be limited in any event to cases where a petition is preferred for the compulsory winding up of a company which asserts its solvency and ability to carry on its business, and the *ratio decidendi* is that the Court should do nothing which might possibly "paralyse" all the affairs of the company, especially, as in the result, the petition might possibly be rejected. I cannot believe that the rule was intended to apply to the case of a company which has admittedly suspended its business and declared publicly its inability to pay its debts. I am fortified in this view by the remarks of the same learned Judge (Lord Romilly) in *In re The Railway Finance Company, Limited* (1). In that case Lord Romilly observed:—"I do not appoint a provisional liquidator *unless it appears that the company cannot go on.*" And in Buckley's Companies Act (9th edition), the rule is laid down that "a provisional liquidator was not, in general, appointed before the hearing of the petition, unless the company was shown to be insolvent, or unless the petition was presented by the company itself or shown to be unopposed" (p. 342).

In the present case it is obvious from the admissions made before me and from facts on the record, which are not denied, that the People's Bank has in fact suspended business and directed all its numerous branches to suspend business; and that consequently the Bank, as such, "cannot go on." Admittedly, it must go into liquidation, and apparently the only doubt at present, so far as the Bank is concerned, is whether it should be wound up under the supervision of the Court,—in the event of a certain arrangement whereby a new company

(1) 14 W. R. (Eng.) 754 and 3 Mew's Digest, 1911 (*In re The Railway Finance Company, Limited*).

is to take over all its rights and liabilities, being effected,—or go into voluntary liquidation. In ground (2) of the grounds of appeal filed in this Court it is asserted, apparently without regard to the resolution passed at the meeting of shareholders on the 26th October 1913, that “the company has resolved to go into *voluntary liquidation*.” For this extraordinary error possibly the learned counsel who drafted the grounds of appeal is alone responsible, and it is unnecessary for me to lay stress upon it. The fact, however, remains that the company is confessedly unable to go on with its business and must go into liquidation, whether voluntarily or involuntarily. Mr. Beechey’s argument, that the Bank is not insolvent because it is possible that sooner or later it may be in a position to pay all its debts, strikes me as being somewhat desperate. I find it difficult to appreciate the rather subtle distinction between “insolvency” and inability to pay debts, publicly notified to the world at large; or to believe that a Bank conducted by persons of ordinary intelligence and sanity would deliberately close its doors and suspend its business if there was any real prospect of its being in a position, within reasonable time, to liquidate all its debts in full. But, be that as it may, that there is in the present case no such prospect is clear from the admitted fact that liquidation is inevitable so far as the People’s Bank is concerned. When a company has to admit that it has, in all its branches, suspended business, and that it must inevitably go into liquidation, and that its only hope of salvation is that a new company may be formed to take its place, I have no hesitation in saying that such a company is not merely “plainly and commercially,” but also “technically insolvent,” and in the case of such a company, I am of opinion that a Court is fully justified in taking action under section 134 and appointing a provisional liquidator.

Mr. Beechey has referred me to section 140 of the Act which provides that “the Court may, as to all matters relating “to the winding up, have regard to the wishes of creditors and “contributories as proved to it by sufficient evidence,” and to section 193, which enacts that “the Court may, in determining “whether a company is to be wound up altogether by the “Court or subject to the supervision of the Court, in the “appointment of a liquidator or of liquidators, and in all other “matters relating to the winding up, subject to supervision, “have regard to the wishes of the creditors or contributories as “proved to it by sufficient evidence, etc.” These provisions

are, I consider, wholly irrelevant to the question now before me, as it is not for me at this stage of the case to decide whether or not the petition of the respondents is to be accepted or rejected. That is a matter for determination by the District Judge when the case comes before him on the 14th instant, and I would repeat that I desire to say nothing with regard to it which can be interpreted as an expression of opinion on my part as to how it should be decided. All that is necessary for me to say at present is that I cannot agree that the very restricted powers conferred upon the provisional liquidator in this case can in any way injure or prejudicially affect the affairs of the company or the interests of the creditors. On the contrary, I consider that the due discharge by the provisional liquidator of the duties imposed upon him will tend to protect the interests of the creditors, while at the same time in no way "paralysing" the affairs of a company which is already itself "paralysed" in the sense that it is unable to "go on" with its business.

For the reasons given, I think the District Judge was justified in appointing a provisional liquidator and I accordingly dismiss this appeal with costs.

Appeal dismissed.

No. 32.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

ISHAR—(PLAINTIFF)—APPELLANT

Versus

THE MUNICIPAL COMMITTEE OF LAHORE—

(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1006 of 1912.

Punjab Municipal Act, XX of 1891, section 38—notice of suit.

Held, that section 38 of the Municipal Act does not apply to a suit for a declaration that plaintiff is the owner of a certain plot of land, and that the defendant (Municipal Committee) who refused plaintiff permission to build on it, alleging that it was their property, had no right to it.

I. L. R. 22 Bom. 230 (1), I. L. R. 22 Bom. 283 (2), I. L. R. 22 Bom. 289 (F. B.) (3), I. L. R. 22 Bom. 636 (4) and I. L. R. 25 Bom. 142 (5), approved.

(1) (1896) *I. L. R. 22 Bom. 230 (Patel Pana Chand v. Ahmedabad Municipality).*

(2) (1896) *I. L. R. 22 Bom. 283 (Kashinath v. Gangabai).*

(3) (1896) *I. L. R. 22 Bom. 289 (F.B.) (Manohar Ganesh v. Dakor Municipality).*

(4) (1897) *I. L. R. 22 Bom. 636 (Hari Lal v. Himat).*

(5) (1900) *I. L. R. 25 Bom. 142 (Municipality of Parola v. Lakshman Das).*

Second appeal from the decree of Major A. A. Irvine, Divisional Judge of the Lahore Division, dated the 15th day of April 1912.

Zia-ud-Din and Hukam Chand, for appellant.

Nemo, for respondent.

The judgment of the learned Chief Judge was as follows:—

12th Nov. 1913.

SIR ARTHUR REID, C. J.—This is a suit for a declaration that the plaintiff-appellant is the owner of a certain plot of land and the Lahore Municipal Committee, who refused the appellant permission to build on it, alleging that it was their property, had no right to it. The lower Appellate Court held that the suit was barred by section 38 of the Punjab Municipalities Act, 1891, notice of suit not having been given to the Municipal Committee. *I. L. R. 22 Bom. 230 (1), I. L. R. 22 Bom. 283 (2), I. L. R. 22 Bom. 289 (F. B.) (3), I. L. R. 22 Bom. 636 (4), I. L. R. 25 Bom. 142 (5)* are authority for the contention that section 38 does not apply to this suit, and no authority to the contrary has been cited. The pleader for the Municipal Committee, indeed, has not taken the trouble to appear, though the appeal was not called until after 11 o'clock.

The slight difference in the terms of section 38 and the corresponding sections of the Bombay Act considered in the rulings does not affect the decision.

I decree the appeal, set aside the decree of the lower Appellate Court and remand the appeal under Order XLI, rule 23, for decision in accordance with law.

Court-fee on the memorandum of appeal will be refunded and other costs of this Court will be costs in the cause.

Appeal accepted.

No. 33.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

ALLAH DITTA—(PLAINTIFF)—APPELLANT

Versus

MUSSAMMAT FARZ BIBI AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 2349 of 1913.

Transfer of Property Act, section 111 (g)—whether lease has determined by reason of lessee sub-letting the premises.

- (1) (1896) *I. L. R. 22 Bom. 230 (Patel Panachand v. Ahmedabad Municipality).*
- (2) (1896) *I. L. R. 22 Bom. 283 (Kashinath v. Gangabai).*
- (3) (1896) *I. L. R. 22 Bom. 289 (F.B.) (Manohar Ganesh v. Dakor Municipality).*
- (4) (1897) *I. L. R. 22 Bom. 636 (Hari Lal v. Himat).*
- (5) (1900) *I. L. R. 25 Bom. 142 (Municipality of Parola v. Lakshman Das).*

Held, that having regard to section 111 (g) of the Transfer of Property Act, a lease does not determine on breach of the condition not to sub-let, in the absence of an express condition for re-entry by the lessor or for the lease becoming void on a breach of the condition not to sub-let.

14 P. R. 1898 (1), I. L. R. 26 Mad. 157 (2) and I. L. R. 28 All. 400 (3), referred to.

Second appeal from the decree of T. P. Ellis, Esquire, District Judge, Lahore, dated the 3rd December 1912.

Moti Lal, for appellant.

Parduman Das, for respondents.

The judgment of the learned Chief Judge was as follows :—

SIR ARTHUR REID, C. J.—The question for consideration is, whether the appellant's lease has determined by forfeiture by reason of his having sub-let the premises leased to him. The Court of first instance held that it had not, but the lower Appellate Court held that it had, relying on the insertion of the words "*dokandari khud*" as the purpose for which the premises had been leased. The pleader for the appellant relies on 14 P. R. 1898 (1), *Parameshri v. Vittappa Shanbaga* (2) and *Netrapal Singh v. Kalyan Das* (3), and section 111 (g) of the Transfer of Property Act, for the proposition that a breach of a condition in a lease does not effect forfeiture unless the lease contains a provision that on breach of that condition the lessor may re-enter or the lease shall become void. Section 108 (j) of the Transfer of Property Act is also relied on, for the proposition that the lessee might sub-let in the absence of conditions to the contrary; and it was contended that the words "*dokandari khud*" should not be interpreted as prohibiting sub-letting. I am not satisfied that these words were intended to prohibit sub-letting and, in any case, I have no hesitation in holding that the rule laid down in section 111 (g) of the Act applies, and that the absence of an express condition, for re-entry by the lessor or for the lease becoming void on a breach of the condition not to sub-let, if such existed, is fatal to the defendants. 19th Nov. 1913.

It appears that the rent entered in the lease is Rs. 2-5-0 per mensem, that the appellant sub-let for Rs. 3 per mensem,

(1) 14 P. R. 1898 (*Abdul Kadir v. Nur-ud-Din*).

(2) (1902) I. L. R. 26 Mad. 157 (*Parameshri v. Vittappa Shanbaga*).

(3) (1906) I. L. R. 28 All. 400 (*Netrapal Singh v. Kalyan Das*).

and that the owners' have found another tenant at Rs. 4 per mensem. I concur in the opinion recorded by the Court of first instance that this rise in the rent obtainable was at the bottom of the owners' action and their anxiety to terminate the lease. The appeal is decreed with costs of all Courts.

* * * * *

Appeal accepted.

No. 34.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

JOTI PARSHAD—(PLAINTIFF)—APPELLANT

Versus

SANT LAL—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 655 of 1913.

Indian Limitation Act, IX of 1908, articles 49 and 120—suit by one brother against another brother for recovery of half the jewelry and house left by the widow of a third brother.

Plaintiff sued his brother for recovery of half the jewelry and house left by the widow of another brother—

Held, that the suit was governed by article 120 of the Limitation Act, and not by article 49.

I. L. R. 21 Cal. 157 (P. C.) (1), I. L. R. 19 All. 169 (2), I. L. R. 34 Mad. 511 (F. B.) (3) and I. L. R. 9 Cal. 79 (4), referred to.

Second appeal from the decree of M. L. Waring, Esquire, Divisional Judge, Ambala Division, dated the 20th January 1913.

Lajpat Rai, for appellant.

Tek Chand, for respondent.

The judgment of the learned Chief Judge was as follows :—

3rd Dec. 1913.

SIR ARTHUR REID, C. J.—This is a suit by one brother for recovery from another brother of half the jewelry and house left by the widow of another brother.

The widow died in February 1908 and the suit was filed in January 1912.

The appellant's case is that he was entitled to half, and that the respondent wrongfully took possession of the whole, on the widow's death.

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- (1) (1893) *I. L. R. 21 Cal. 157 (P. C.) (Mahomed Riasat Ali v. Iasin Banu).*
 (2) (1896) *I. L. R. 19 All. 169 (Umaradaraz Ali Khan v. Wilayat Ali Khan).*
 (3) (1910) *I. L. R. 34 Mad. 511 (F. B.) (Khadersa Hajee Bappu v. Puthen Veettil).*
 (4) (1882) *I. L. R. 9 Cal. 79 (Issur Chunder Dass v. Juggut Chunder Shaha),*

Mahomed Riasat Ali v. Hasin Banu (1), *Umaradaraz Ali Khan v. Wilayat Ali Khan* (2), and *Khadersa Hajee Bappu v. Puthen Veethil* (3) are clear authority for the application of article 120 of the Limitation Act, the result being that the suit was within limitation. The lower Appellate Court was mistaken in thinking that the 21 Cal. judgment dealt with a suit for a declaration only; possession of movables was included in the claim therein. *Issur Chunder Dass v. Juggut Chunder Shaha* (4), cited for the respondent, does not help him.

I decree the appeal, set aside so much of the decree of the lower Appellate Court as dismissed the suit for movables, and remand the appeal under Order XLI, rule 23 of the Code of Civil Procedure to the lower Appellate Court for decision in accordance with law.

Court-fee on the memorandum of appeal here will be refunded. Other costs of this Court will be costs in the cause.

Appeal accepted.

No 35.

Before Hon. Mr. Justice Kensington

and

Hon. Mr. Justice Beadon.

NANAK CHAND—(PLAINTIFF)—APPELLANT

Versus

JIWAN MAL—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1562 of 1912.

Indian Court-Fees Act, VII of 1870, Schedule II, article 17 (ii)—suit for cancellation of a deed of release (faragkhathi)—consequential relief—Court-fee—Civil Procedure Code, 1908, order 7, rule 11 (b).

Held, that a suit for cancellation of a deed of release (faragkhathi) and for any other relief to which plaintiff may be entitled is not covered by article 17 (iii), schedule II of the Court-Fees Act, but must be stamped *ad valorem* on the amount at which plaintiff elects to value his relief.

I. L. R. 23 Mad. 490 (5), *I. L. R. 29 Bom. 207* (6), *109 P. R. 1893* (7), referred to.

I. L. R. 30 Cal. 788 (8), distinguished.

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- (1) (1893) *I. L. R. 21 Cal. 157* (P.C.) (*Mahomed Riasat Ali v. Hasin Banu*).
 - (2) (1896) *I. L. R. 19 All. 169* (*Umaradaraz Ali Khan v. Wilayat Ali Khan*).
 - (3) (1910) *I. L. R. 34 Mad. 541* (F.B.) (*Khadersa Hajee Bappu v. Puthen Veethil*).
 - (4) (1882) *I. L. R. 9 Cal. 79* (*Issur Chunder Dass v. Juggut Chunder Shaha*).
 - (5) (1899) *I. L. R. 23 Mad. 490* (*Samiya Marali v. Minammal*).
 - (6) (1904) *I. L. R. 29 Bom. 207* (*Parvatibai v. Vishvanath*).
 - (7) *109 P. R. 1893* (*Hakim v. Mussammatt Mahtab Kaur*).
 - (8) (1903) *I. L. R. 30 Cal. 788* (*Zimattunnessa v. Girindra Nath*).

Held also, that when plaintiff fails to make up the deficiency in court-fees as ordered by the Court, his plaint should be rejected under order 7, rule 11 (b) of the Code of Civil Procedure.

First appeal from the decree of Sheikh Muhammad Niaz-ud-Din, District Judge, Shahpur, dated the 6th July 1912.

Nanak Chand, for appellant.

Nand Lal, for respondent.

The Judgment of the Court was delivered by:—

2nd July 1913.

KENSINGTON, J.—This suit was instituted on the 25th January 1912 on a stamp of Rs. 10 as one for a declaration that a release deed (faraghkhati), dated 17th June 1911, and registered on the 19th December 1911, be considered cancelled.

At the first hearing the defendant pleaded that the suit should be stamped on the jurisdictional value of Rs. 15,000. There was no replication to this plea, and on the 1st June 1912 the Court decided that the plea was correct and that full stamp duty must be paid. Time was eventually given up to the 6th July and the plaintiff then stated that he was unable to pay the required fee. The Court thereon dismissed his suit with costs by the very brief judgment under appeal and drew up a formal decree in these terms.

The case is before us as if it was a first appeal from a decree, and the first point to be decided is, whether the District Judge was right in holding that the suit required to be stamped *ad valorem* on Rs. 15,000, at which sum plaintiff valued his relief in the plaint.

The parties are brothers living at Bhera and conducting a business at Merowal some five miles away. The ostensible meaning of the suit is that plaintiff desires to avoid the terms of the Hindu joint family separation consequent on the deed in respect of which the suit is brought. His alleged reason is that he has discovered that the property is worth not Rs. 6,000, as he originally supposed, but Rs. 30,000, and we are asked to believe that he was unaware of the facts when the deed was executed, in consequence of the comparatively recent death of the father of the parties in October 1908.

The plaintiff contends that his suit has been correctly stamped at Rs. 10 under article 17 (iii) of schedule II to the Court-Fees Act, on the ground that no consequential relief is involved in a suit brought under section 39, Specific Relief Act. We consider that there is sufficient authority against this

contention in *I. L. R. XXIII Mad.* 490 (1), *XXIX Bom.* 207 (2), and 109 *P. R.* 1893 (3). A mere declaration is useless to plaintiff without, at least, such further relief as is involved in sending the copy of the decree to the Registration Department, as required by the second para. of section 39, Specific Relief Act, while substantially the plaintiff is really suing for a larger money share in the joint family property than he would otherwise get. The only ruling at all in his favour which plaintiff's counsel has been able to quote as in any way relevant is that given in *I. L. R. XXX Cal.* 788 (1), but that case should be distinguished as being one for cancellation of a decree. We are satisfied that the District Judge was so far correct in holding that plaintiff was bound to stamp his plaint *ad valorem* with reference to the amount whatever it may be, at which he elects to value his relief. It is observed that by para. 12 of his plaint plaintiff asked for any other relief to which he might be entitled as well as for cancellation of the deed.

But the lower Court has clearly gone wrong both in dismissing plaintiff's suit and in allowing extravagant pleader's fee costs to the defendant (Rs. 450) in the decree which has been wrongly drawn up as for dismissal of a suit. The proper order to pass was one for rejection of the plaint under rule 11 (b) of order VII, Civil Procedure Code, and, as this rejection took effect at an early stage in the trial, there was no justification for allowing excessive costs to the defendant, especially as the parties had been endeavouring up to that stage of the trial to come to terms by private arrangement.

The plaintiff's appeal is accordingly rejected on the question of stamp duty. It is accepted on other points and the lower Court's decree is set aside. The order of that Court is altered to one for rejection of the plaint, and the pleader's fee costs adjudged to defendant in that Court will be reduced from Rs. 450 to Rs. 32.

The plaintiff is only partially successful before us and it is directed that the parties shall pay their own costs in the Chief Court.

Appeal accepted in part.

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- (1) (1899) *I. L. R.* 23 *Mad.* 490 (*Samiya Mavali v. Minammal*).
 - (2) (1904) *I. L. R.* 29 *Bom.* 207 (*Parratibai v. Vishranath*).
 - (3) 109 *P. R.* 1893 (*Hakim v. Mussamat Mahtab Kaur*).
 - (4) (1903) *I. L. R.* 30 *Cal.* 788 (*Zinnatunnessa v. Girindra Nath*).

No. 36.

Before Hon. Mr. Justice Johnstone and
Hon. Mr. Justice Shah Din.

DIAL DAS—(PLAINTIFF)—APPELLANT

Versus

MUSSAMMAT DHIANUN—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1199 of 1909

Custom—succession—Bairagi of Kulu—validity of marriage—widow excludes the guru—Riwaj-i-am.

Held, that in Kulu a Bairagi may marry an agriculturist woman by *Ganesh puja* and the minor restrictive rules of Hindu Law, such as the naming of certain classes into which a Bairagi may or may not marry cannot with propriety be applied in that district in the absence of proof of special custom.

I L. R. 3 All. 738 (1), I. L. R. 12 Mad. 72 (2), 13 Mad. I. A. 497 (506) (3), 24 P. R. 1880 (4), and 135 P. R. 1884 (5), referred to.

Held, also that in matters of succession the widow of a Bairagi of Kulu excludes the Guru.

Further appeal from the decree of H. A. Casson, Esquire, Divisional Judge, Kulu, dated the 17th September 1909.

Tek Chand, for Appellant,

Shadi Lal, for Respondent.

The judgment of the Court was delivered by—

6th Dec. 1913.

JOHNSTONE, J.—In this case Dial Das, Bairagi, of Kot Nagar in Kulu, sued Mussammat Dhiannu for the landed property left by one Dinun, Bairagi, in Phati Halan, Kothi Nagar, contending that he was rightful heir as *Guru* of the deceased and had a better title to succeed than defendant, whether she was lawful wife of the deceased (which is not admitted) or merely his mistress, (as plaintiff avers she was).

In the first Court the case was said to have been fought out on two issues—Was plaintiff Dinun's *Guru*? And does a *Guru* succeed before a widow? Before stating these issues in the judgment, however, the Court found that it had been conclusively proved that defendant was married to deceased by *Ganesh puja* and was his wife. It then discussed the evidence of fact and custom, and found that plaintiff was *Guru* of deceased, and that as such he must be preferred to defendant, a mere widow.

On appeal, the lower appellate Court, at a preliminary hearing with the records before it noticed that the local

(1) (1881) *I. L. R. 3 All. 738* (*Bhaoni v. Maharaj Singh*).

(2) (1888) *I. L. R. 12 Mad. 72* (*Brindavana v. Radhamani*).

(3) (1870) *13 M. I. A. 497 (506)* (*Sri Gajapathi Radhika Patta v. Sri Gajapathi Nilamani*).

(4) *24 P. R. 1880* (*Bansi v. Mihan Singh*).

(5) *35 P. R. 1884* (*Mussammat Lakhi v. Mussammat Jai Devi*).

Commissioner, Rai Megh Singh of Kulu, described by the first Court as a sort of "standing Court of honour on questions of caste," had misread some of the evidence given before him, and also thought the precedents mentioned by the *patwari* needed looking into; and, finally, upon the regular hearing of the appeal, accepted it with costs throughout.

We have now heard arguments on this further appeal preferred by plaintiff, and have arrived at the conclusion that the lower appellate Court's final conclusions at least are correct. The first question for consideration need not detain us long, namely, whether defendant was lawful wife of deceased Dinun or not. The evidence of a ceremony and of cohabitation long continued is considerable and sufficient; and it seems to us impossible to introduce into the discussion rules of strict Hindu Law. [We have been referred to such authorities as Mayne, 7th Edition, page 100, *I. L. R. 3 All. 738*(1), *I. L. R. 12 Mad. 72* (2), 13 *M. I. A. 506*(3), 14 *Mad. L.J. 271* (at page 282)].

It may be that among orthodox Hindas down-country a marriage by *Ganesh puja* is mere concubinage, or that a member of a holy caste cannot lawfully marry an agriculturist woman; but here we start with unorthodoxy, for, strictly speaking, a Bairagi may not marry at all. In Kulu, and perhaps elsewhere also, Bairagis have married, and have been succeeded in their estate by their children and in Kulu there is no indication on the record that the marriage of a Bairagi as such is looked upon as improper or invalid. This being so, it seems to us that the *minor* restrictive rules of Hindu Law, such as the naming of certain classes into which a Bairagi may or may not marry, cannot, with propriety, be applied in that district, in the absence of proof of special custom. No such restrictive custom is shown to exist. In this very family in earlier generations sons by Kanet wives have succeeded, and there are virtually no instances to the contrary. This is natural enough, for the Bairagis are not a race by themselves. Apparently any one can become a Bairagi by submitting to the rules of the order and by being appointed by a *Guru* as his *chela*. Dinun was probably by origin an agriculturist himself, though his great grandfather came to Kulu as a Bairagi; and whether this is so or not, the said ancestor clearly settled down into the agriculturist plane.

(1) (1881) *I. L. R. 3 All. 738* (*Bhaoni v. Maharaj Singh*).

(2) (1888) *I. L. R. 12 Mad. 72* (*Brinlavana v. Radhamani*).

(3) (1870) 13 *M. I. A. 497* (506) (*Sri Gajapathi Radhika Patta v. Sri Gajapathi Nilamani*).

We hold, then, that defendant was lawful wife to Dinun, finding ourselves confirmed in this way of looking at the matter by the views expressed in 24 P. R. 1880 (1) (a Bairagi case) and 135 P. R. 1884 (2) (a case of Gharbari Gosains).

The next question is, whether a *Guru* or a widow succeeds in the absence of *chela* or male issue. Mr. Shadi Lal does not deny that plaintiff is deceased's *Guru*; he merely argues that, as the property is private and not religious, spiritual relations have no concern with it; that Hindu Law, under which a widow takes a life-estate in default of male issue, applies; and that, even if strict Hindu Law is not to be applied, actual custom is on his client's side. Mr. Tek Chand's attitude on behalf of plaintiff is that custom applies, but that it is Bairagi custom, and not agriculturist Kanet custom, and that under it the *Guru* is preferred to the widow.

Clearly what we have to ascertain is the actual custom followed by the Bairagis of that part of Kulu. To determine this we have oral evidence in the shape of opinions, oral and other evidence of actual instances, the *Riwaj-i-am* and views expressed on cognate points in rulings of this Court. The first thing to see is the *Riwaj-i-am*, which deals separately with Bairagis.

Question 1 is primarily concerned with the powers of a Bairagi widow in dealing with her late husband's estate. The marriage of Bairagis is implicitly recognized herein, and the position of a widow is thus set forth:—

Hamari Kaum men aurat bewa ke bilkul kisi tareh ka ikhtiyar nahin, albutta jab tak dar parda apne ghar men ba izzat abru baithi rahe kisi ko shouhar na kare aur na kisi se dosti lagawe tab tak nan parcha ki mustahikk zarur hai agar koi chela waghaira na ho to ta hayat-i-khud hakkiyat par kabiz rahkar apna guzara kare.

That is, if the widow remains unmarried and chaste, and there is no *chela waghaira* she has an estate like that of an ordinary Hindu or agriculturist widow. The plaintiff's case is that *waghaira* and or or "others" includes the *Guru*, and the first Court agrees with him. The learned Divisional Judge, on the other hand, says with defendant that the *Guru* is not one of these "others"; and this is also our view.

The other part of the *Riwaj-i-am* which has come under discussion is question 23, which also is not directly concerned with the competition between widow and *Guru*. As the due

(1) 24 P. R. 1880 (*Bansi v. Mihan Singh*).

(2) 135 P. R. 1884 (*Mussamat Lakhi v. Mussamat Jai Devi*).

interpretation of that question and its answer is not free from difficulty and has been much discussed both in the Lower Courts and before us, we think it necessary to set it forth here at length in vernacular.

Q.—Agar pisar-i-mutlanna shuda ke asli bap ki aulad pisari na rahe to uska wisa pisar-i-mutbannana shuda milega ya digar shurakayan ko ?

A.—Jawab malikan-i-kaum Bairagi, pisar-i-mutbanna shuda ke asli bap ki aulad na ho we to jo wari uske bap ke hon unka hakk hai, chunauchi hamari kaum men yih hi riwaj hai agar mutbanna ya chela ya hadik na ho we to bhai ya gur bhai, agar yih bhi na hon to mama, agar yih bhi na ho to gurdwara, agar gurdwara na ho to akhara ke sarband ko hakk paunchta hai.

(The rest is irrelevant).

This is a singular answer and does not seem to us to cover a case like the present. It deals with the case of a Bairagi who has had a son of his body, which son has been adopted by another man, and dies, leaving no other son of his body. It lays down a rule of succession to the property of that Bairagi, under which the son who has been adopted and has gone away, is entirely excluded. It is implied that the next heir of the Bairagi would be a son adopted by him or a *chela* appointed by him, if either exists; in default a *bhai* or *gurbhai*; again, in default, the maternal uncle; next, the *gurdwara*; and, lastly, the *akhara*. There is some confusion of thought in the framing of these categories of heirs; the introduction of the maternal uncle is bizarre, is opposed to each and every custom or law known in this Province, and is wholly unsupported by evidence of practice. But leaving this point aside we think the lower appellate Court is hardly right in reading the above answer as placing the deceased's *waris*, which he says includes the widow, in a category by themselves above the adopted son and *chela*. Such an interpretation would prefer the widow even to an adopted son or *chela*, a position which seems to us hopelessly untenable. Nowhere in this Province in any tribe or fraternity have we ever found widows given so high a status as this, and there is no evidence whatever that among these Bairagis a widow has ever excluded an adopted son or a *chela*. It is, therefore, clear that the *wari*s in the first sentence of the above answer are the persons detailed in the next sentence; and it must be admitted that the widow does not appear in the list any more than the *guru*.

In omitting the widow the answer clearly conflicts with Q. 1 and to our minds the only reasonable interpretation of Q.

and A. 23, is, that either through careless drafting, or because the widow's rights were thought to have been sufficiently safeguarded in Q. 1. Answer 23 is not exhaustive and so can afford no guide in the present case: it omits widows who clearly do come in somewhere, and its omission of *gurus* in the circumstances cannot be used against plaintiff.

The case has to be decided on actual instances of competition between widow and *guru*. There are five instances of widows' succession, a very respectable number in so small a community. These are undoubted successions vouched for by the revenue records, and they were put forward as showing that widows excluded *gurus*. The opposite party never ventured to ask if *gurus* existed, and in all the circumstances it is a reasonable inference that they did exist, for plaintiff would certainly have raised the point if any advantage could have been gained by so doing. On the other hand, the cases of *gurus* succeeding at all are few and far between. In the only clearly authentic case,—Yarju's—its whole value is destroyed by the widow's own deposition that she deserted her husband before he died, eloped and married a Brahmin. Instances of *chelas* excluding widows are not in point. In short, *waghaira* in Question 1 does not include the *guru*.

Lastly, the oral evidence stating opinions is not all on one side and by itself can establish nothing. It is in accordance with the views expressed by many learned Judges of this Court that such cases as the present must be decided on actual past practice, if it is fairly clear. We think in the present case it is fairly clear, as we have shewn; and we are fortified in our opinion by a consideration of the general circumstances and especially of the extreme probability that this family is of Kanet; i.e., agriculturist origin. Obviously in many ways the strict rules of the Bairagi fraternity as to celibacy and restrictions on eating and drinking are ignored; widows have succeeded in many cases; *Kultut chelas*, who by strict rule as stated in Question 20 of the *Riwaj-i-am* are excluded from succeeding to the natural parents, have so succeeded in practice; and the children of the family by Kanet wives have been allowed to inherit without contest. All this makes it easy and right to take it as proved with sufficient clearness that among these Bairagis the widow excludes the *guru*, provided she remains a widow and is chaste.

We dismiss the appeal with costs.

Appeal dismissed.

No. 37.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Chevis.*

PAL SINGH AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

GANDA SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 718 of 1909.

Custom—alienation—locus standi of collaterals in 8th degree to challenge an alienation in favour of another collateral in same degree—Palli Jats, Shakargarh Tahsil, Gurdaspur District—onus probandi.

Held, that the general custom of the Punjab does not recognise the right of collaterals, however remotely related, to challenge alienations, and that in the case of very distant collaterals the onus of proving a right of control rests on them.

Held, that in this case, where the plaintiffs challenging an alienation were collaterals in the 8th degree the onus of proving a special custom entitling them to do so was on them, and that they had failed to prove such custom.

75 P. R. 1898 (1), 35 P. R. 1906 (2), 24 P. R. 1912 (3), and 96 P. R. 1913 (4), referred to.

Held also, that the fact that the alienation is in favour of a collateral related in the same degree as the plaintiffs would not have prejudiced the plaintiffs' right.

35 P. R. 1906 (2), distinguished.

Further appeal from the decree of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated the 1st May 1909.

Muhammad Shafi, for Appellants.

Ganpat Rai and Beechey, for respondents.

The judgment of the Court was delivered by—

CHEVIS, J.—This is a suit for a declaratory decree, the 13th Dec 1913. plaintiffs who are collaterals of the alienors in the eight degree (counting in the regulation manner, *ie.*, from the alienors to the common ancestor, both included), challenging a mortgage of land

(1) 75 P. R. 1898 (*Arur Singh v. Mussammat Lachmi*).

(2) 35 P. R. 1906 (*Khazan Singh v. Relu*).

(3) 24 P. R. 1912 (*Hazara Singh v. Harnam Singh*).

(4) 96 P. R. 1913 (*Mussammat Partapo v. Asa Ram*).

as not being for necessity. Both the lower Courts have held that the mortgage, which was for Rs 2,140, was for necessity only to the extent of Rs 890, but while the first Court gave the plaintiffs a decree the learned Divisional Judge has dismissed the suit on the ground that plaintiffs have failed to prove that such distant collaterals have any right to challenge the alienation.

The plaintiffs appeal to this Court.

The parties are *Palli Jats* of the *Shakargarh Tahsil*, *Gurdaspur District*, and it is urged on plaintiffs' behalf that Jats and Rajputs in particular, favour the agnatic theory.

In this particular case the alienee is also a collateral related to the alienors in the same degree as the plaintiffs, but we are not disposed to think that this alone is any bar to the plaintiffs' success, for, assuming that they have a right to control the alienors, they are entitled to claim that their rights shall not be prejudiced at all, even by alienation to a co-heir; it is only in the case of a gift made to a collateral for services rendered that an exception in this respect is made (*vide* 35 P. R. 1906) (1).

The usual well-known rulings have been cited, and it is urged on plaintiffs' behalf that, no matter how distant the relationship may be, the next heir, if he be an agnate, has a right not only to succeed but also to control. We do not propose to examine all the cases cited. We may remark that cases in which the real dispute is one of succession, (as, for instance, where distant collaterals fail to set aside an alienation in favour of a daughter or a daughter's son), are not really in point; such cases are merely cases of accelerated succession.

To quote all the cases which have been cited before us in this case would be useless. The older rulings are to be found cited on pages 107 and 108 of *Rattigan's Digest of Customary Law*, seventh edition, while more recent rulings are summed up in 24 P. R. 1912 (2) and 96 P. R. 1913 (3). The earlier rulings shewed a tendency to regard the fifth, or at the most the seventh degree as the farthest degree to which the right of control could be ordinarily said to extend. Later rulings, *e.g.*, 75 P. R. 1898 (4) and 35 P. R. 1906 (1), indicated a tendency to extend the right of control indefinitely, but in recent rulings the tendency is to revert to the old standards. So in 24 P. R. 1912 (2), where 75 P. R. 1898 (4) and 35 P. R. 1906 (1)

(1) 35 P. R. 1906 (*Khazan Singh v. Relu*).

(2) 24 P. R. 1912 (*Hazara Singh v. Harnam Singh*).

(3) 96 P. R. 1913 (*Mussammatt Partapo v. Asa Ram*).

(4) 75 P. R. 1898 (*Arur Singh v. Mussammatt Lachmi*).

are specially noticed (see last para. on page 87),¹ collaterals in the eleventh degree were held to be incompetent to challenge alienations.

It is impossible to lay down any definite degree of relationship beyond which it should be presumed that in the absence of a special custom collaterals have no *locus standi* to challenge alienations, but we hold, with all possible respect for the opinions expressed in 75 *P. R.* 1898 (1) and 35 *P. R.* 1906 (2), that the general custom of the Punjab does *not* recognize the right of all collaterals, however remotely related, to challenge alienations, and that in the case of very distant collaterals the *onus* of proving a right to control rests on the persons who challenge the alienations, and not on the alienees. Though it is impossible to lay down any definite limit, it is obvious that the more distant the relationship the greater must be the presumption against the right to control. Collaterals in the sixth degree have usually been successful, and the same may probably be said of collaterals in the seventh degree. But when we come to the eighth degree collaterals seem usually to have failed (see the list of cases cited at foot of page 167 of Rattigan's Digest). Beyond the eighth degree success becomes rarer still, but it may be noted that collaterals have succeeded even up to the tenth degree. Still viewing the whole of the authorities cited we are of opinion that the *onus* should be on the plaintiffs in this case of proving that they have a right to challenge the alienations. No special custom is proved or even alleged, and the plaintiffs have failed to discharge the *onus*.

We uphold the decision of the learned Divisional Judge and dismiss the appeal with costs.

Appeal dismissed.

No 38.

Before Hon. Mr. Justice Shah Din and

Hon. Mr. Justice Beudon.

PALA RAM—(PLAINTIFF)—APPELLANT

Versus

CHENA MAL AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No 1212 of 1911.

Partnership—Suit by one partner against his co-partners for money, without dissolution of the partnership.

Plaintiff and defendants had entered into a partnership for the acquisition of certain standing timber and for its disposal in the shape of beams

(1) 75 *P. R.* 1898 (*Arur Singh v. Mussammat Lachmi*).

(2) 35 *P. R.* 1906 (*Khazan Singh v. Relu*).

and sleepers. After part of the work had been done the partners entered into an agreement by which plaintiff in return for certain remuneration should complete the work of the partnership. Plaintiff now sues defendants for the remuneration alleged to be due to him under this agreement. It was admitted that the partnership had not yet been dissolved.

Held, that the suit was not maintainable without dissolution of the partnership and rendition of accounts.

110 P. R. 1901 (1), and I. L. R. 32 Mad. 76 (2), distinguished.

First appeal from the decree of J. A. Ross, Esquire, District Judge, Kangra, at Dharmasala, dated the 28th July 1911.

Devi Dial. for Appellant.

Shadi Lal and Tek Chand. for Respondents.

The judgment of the Court was delivered by—

13th Dec. 1913.

BEADON, J.—In 1907 the plaintiff and the defendants in this case entered into a partnership to acquire certain standing timber in jungle Sandharag, to saw it into beams and sleepers and to carry and float the beams and sleepers for disposal at Dehra Gopi.

The share in profit and loss of the plaintiff, who gave his services to see to the carrying out of the work, was $\frac{1}{3}$ th and the share in profit and loss of the defendants, who provided the funds, was $\frac{2}{3}$ ths.

It is admitted before us that, though the business of the partnership has now been completed, the partnership has not yet been dissolved.

After part of the work had been done the partners, on the 23rd November 1909, entered into an agreement by which it was arranged that plaintiff in return for certain specified remuneration should complete the work of the partnership and the plaintiff now sues the defendants for the remuneration alleged to be due to him under this agreement.

The lower Court, holding that the plaintiff should sue for dissolution of the partnership and rendition of accounts, has dismissed the suit on the ground that it is not maintainable in its present form and the question before us is, whether this decision is right or wrong.

No doubt, in certain circumstances, a partner on grounds of equity can be allowed to sue his co-partners for money without

(1) 110 P. R. 1901 (*Azim Khan v. Muhammad Riaz-ud-din*).

(2) (1903) I. L. R. 32 Mad. 76 (*Karri Venkata v. Kallu Narasayya*).

a dissolution of the partnership, and 110 P. R. 1901 (1) and I. L. R. 32 Mad. 76 (2) (relied on by counsel for the plaintiff-appellant) are instances of such cases. The present case, however, is not one of this kind.

Chena Mal and Dewa Mal, defendants, entered into the agreement of the 23rd November 1909 as representatives of the partnership and under this agreement the plaintiff contracted to perform certain work for the partnership. In respect of the remuneration for the work performed under the agreement, the plaintiff is no doubt a creditor of the partnership, but as a partner he is liable with his co-partners for a share of this debt as well as of other partnership debts and he has framed his suit so as to exclude himself from this liability.

In settling the partnership accounts a sum on account of this work, together with a share of the profits of the business (if any), would be credited to the plaintiff and debited to the partnership; but as the business may have resulted in a loss, the plaintiff (being a partner) cannot recover any debt due to him from the partnership until his share of the partnership losses (if any) has been set off against that debt.

Thus a question of profit and loss on the partnership accounts arises and it would be inequitable to allow the plaintiff to claim a particular item without dissolution of the partnership and rendition of accounts.

We find therefore that the suit has been rightly dismissed and we dismiss the appeal with costs.

Appeal dismissed.

No 39.

Before Hon. Mr. Justice Shah Din and

Hon. Mr. Justice Beadon.

GHULAM MOHIY-UD-DIN—(DEFENDANT)—APPELLANT

Versus

DEOKI NAND AND OTHERS—(PLAINTIFFS)—

RESPONDENTS.

Civil Appeal No. 1130 of 1911.

Indian Contract Act, IX of 1872, section 23—Suit on Pronotes given partly in consideration for withdrawal of a criminal prosecution for a non-compoundable offence.

(1) 110 P. R. 1901 (*Azim Khan v. Muhammad Riaz-ud-din*).

(2) (1903) I. L. R. 32 Mad. 76 (*Karri Venkata v. Kallu Narasayya*).

Held, that a promissory note, the object or consideration of which was wholly or in part the withdrawal of a prosecution for an offence which was in law non-compoundable, falls within the term of section 23 of the Contract Act, and is void, notwithstanding that the accounts between the parties were fully gone into, and that the maker admitted his liability for the amount of the Pronote.

I. L. R. 11 Bom. 566 (1), I. L. R. 28 Bom. 326 (2), 5 Indian Cases 98 (3), 16 Cal. W. N. 854 (4), and 135 P. R. 1882 (5), referred to.

I. L. R. 28 All. 718 (6), 9 P. R. 1906 (7), and 31 P. R. 1911 (8), distinguished.

First appeal from the decree of Mirza Zafar Ali, District Judge, Mooltan, dated the 15th August 1911.

Sheo Narain and Fazal Ilahi, for Appellant.

Jai Gopal, for Respondents.

The judgment of the Court was delivered by—

20th Dec. 1913.

SHAH DIN, J.—This appeal arises out of a suit brought by one Hakim Narsingh Das and his son, Gopal Das of Lahore, against the defendant-appellant, Sheikh Ghulam Mohiy-ud-din, to recover Rs. 6,558-10-9 on the strength of two promissory notes, one for Rs 4000 and the other for Rs. 2,452-0-9, which were executed by the said Ghulam Mohiy-ud-din in favour of the said plaintiffs on the 30th April 1909. Hakim Narsingh Das died during the pendency of the suit in the Court of the District Judge, Multan, and his other sons were brought on the record in his place as his legal representatives. The District Judge decreed the plaintiffs' claim in full, and the present appeal has been preferred to this Court by the defendant, Ghulam Mohiy-ud-din.

The pleadings of the parties are set out in the judgment of the District Judge, and it is not necessary to reproduce them here in detail. Suffice it to say that in answer to the plaintiffs' claim, the defendant pleaded, *inter alia*, that the promissory notes sued upon had been executed by him without consideration and under undue influence; that a criminal prosecution under section 406, Indian Penal Code, had been brought against him by the plaintiffs, and that it was in consideration of the plaintiffs' abandoning the criminal proceedings that he executed the promissory notes in question; but

(1) (1887) *I. L. R. 11 Bom. 566 (Kessouji v. Hurjivan)*.

(2) (1904) *I. L. R. 28 Bom. 326 (Dalsukhram v. De Bretton)*.

(3) (1909) *5 Indian Cases 98 (Charan Purkait v. Amrita Lal)*.

(4) (1912) *16 Cal. W. N. 854 (Majibar Rahman v. Mukhtashed Hossain)*.

(5) *135 P. R. 1882 (Masjidi v. Mussammat Ayisha)*.

(6) (1906) *I. L. R. 28 All. 718 (Jai Kumar v. Gauri Nath)*.

(7) *9 P. R. 1906 (Nanak Chand v. Durant)*.

(8) *31 P. R. 1911 (Karm Chand v. Mussammat Basant Kaur)*.

that, as a matter of fact, no money was due by him to the plaintiffs. Upon the pleadings of the parties the District Judge framed the following, among other, issues :—

- (1) Were the promissory notes (exhibits *P. 1* and *P. 2*) executed without consideration and under undue influence ?
- (2) Were the promissory notes executed in order that plaintiffs should abandon the criminal case against the defendant, and hence are they invalid ?

On these issues the District Judge held that the promissory notes in question were executed by the defendant after the accounts between the parties had been fully gone into and settled through one Jamal-ud-din ; that no undue influence was exercised by the plaintiffs on the defendant to induce him to execute the promissory notes : that the abandonment of the criminal proceedings against the defendant under section 406 of the Indian Penal Code, which were then pending in the Court of a Magistrate at Multan, did not form any part of the consideration for the promissory notes, and that, therefore, the promissory notes were not invalid. As a result of these findings the District Judge decreed the plaintiffs' claim with costs.

Pandit Sheo Narain on behalf of the appellant has contended before us that, apart from the question as to whether his client owed any money to the respondent or not and as to whether the accounts between the parties were, or were not, properly gone into by Jamal-ud-Din and understood by his client, the promissory notes executed by him are invalid, and cannot be sued upon, inasmuch as the appellant had executed these promissory notes in consideration of Hakim Narsingh Das and his son abandoning the prosecution for criminal breach of trust under section 406, Indian Penal Code, which was at the time pending against the appellant in the Magistrate's Court, and Hakim Narsingh Das and his son had, on their part, agreed to compound the offence in question and to give up the prosecution on the appellant executing the promissory notes in their favour. The learned Advocate has urged that the evidence on the record clearly proves that but for the undertaking given by Hakim Narsingh Das not to go on with the criminal prosecution the appellant would not have executed the promissory notes, and that, although the promissory notes were executed before the criminal prosecution was dropped and the appellant discharged, they were only handed over to Hakim

Narsingh Das after the prosecution had expressed their inability to prove the offence and an order had been passed by the Magistrate discharging the appellant. At the time when the promissory notes were executed a sum of Rs. 10,000 in cash was deposited by the appellant with the Government Treasurer at Multan on the distinct understanding that this money was to be paid over by the Treasurer to Hakim Narsingh Das after the criminal case had been finally settled in appellant's favour ; and this shows that the real object of the settlement between the parties was that on the one hand, Hakim Narsingh Das should get a certain amount of money in cash from the appellant and also should get him to execute two promissory notes in his favour before he should abandon the criminal prosecution, and that, on the other hand, the appellant should escape the criminal prosecution and get the criminal case withdrawn on executing the promissory notes in favour of Hakim Narsingh Das and on paying him Rs. 10,000 in cash. On these grounds, Pandit Sheo Narain has contended that the case clearly falls within section 23 of the Contract Act ; that the object or part at least of the consideration of the promissory notes being the non-prosecution of an offence which was not compoundable was unlawful, and that, therefore, the promissory notes could not be sued upon in a Court of law

To appreciate the full force of Pandit Sheo Narain's argument, it is necessary to give a brief history of the criminal case to which reference has been made by the District Judge in his judgment. The following extract from that judgment will suffice for the purpose :—

“ Ghulam Ghaus, a servant and agent of Hakim Narsingh Das, lodged on his behalf a complaint against the defendant “ on the 29th January 1909, charging him with criminal breach “ of trust (section 406, Indian Penal Code). The case for the “ prosecution was that Hakim Narsingh Das, his son, Gopal “ Das, and the defendant entered into partnership by a written “ deed to work as contractors ; that Narsingh Das covenanted “ to supply capital and stipulated to receive interest thereon “ at the rate of ten annas per cent per mensem ; that according “ to the terms of partnership Ghulam Mohiy-ud-din was “ bound to enter into the account books of the firm all the “ moneys to be received by him for works constructed and to “ deposit them in certain banks ; that he had received cheques “ for Rs. 3,800, Rs. 6,200 and Rs. 6,871 from the Public Works “ Department on account of the Drainage Work of Multan, but

“ had neither shown these items in the accounts nor deposited them in a bank ; and that he had misappropriated these and several other items. The Magistrate (Lala Kesho Das), after examining Ghulam Ghaus and a clerk of the Public Works Department issued a warrant without bail on the 1st March 1909 for the arrest of the defendant. But it is stated that he was not arrested, as the Sessions Judge accepted his application for bail. At the same time the defendant applied to the District Magistrate to have the case transferred from the Court of Lala Kesho Das and it was transferred to that of Akhund Abdul Shakur Khan. On the 2nd April 1909 the trial of the case commenced before that Magistrate and Ghulam Ghaus was cross-examined at very great length. Then the case was adjourned to 19th April 1909. On that date Ghulam Ghaus and Ghulam Mohiy-ud-din put in a joint application for a further adjournment, on the ground that they wanted to inspect accounts through one Jamal-ud-din. The Magistrate postponed the case to 19th April. On that date Jamal-ud-din sent a telegram to say that he could not come, and the Magistrate fixed 28th April for the next hearing. On that date Ghulam Ghaus and Ghulam Mohiy-ud-din again made a joint application for one day's further postponement stating that the overhauling of accounts commenced by the parties through Jamal-ud-din had not yet been completed. The next day (29th April) the case was again adjourned to 30th April at the request of both the parties and their pleaders. Both parties were represented by pleaders throughout. On the 30th April 1909 Ghulam Ghaus put in an application stating that he could not adduce evidence to prove the offence defined in section 406, Indian Penal Code, and that the accused may be discharged. This application is signed by accused's pleader, Sheikh Muhammad Bakhsh, also. He was discharged on that date and on the same date he executed the two promissory notes, paid Rs. 10,000 cash and also executed a deed of dissolution of partnership.”

Ghulam Ghaus, who prosecuted the appellant on behalf of his master, Hakim Narsingh Das, in 1909, has been examined as a witness for the appellant in this case ; and the appellant has also produced Jamal-ud-din, who is said to have gone into accounts between the parties and brought about a settlement between them which resulted in the discharge of the appellant in the Court of the Magistrate on the 30th April 1909,

Ghulam Ghaus made a lengthy statement in the lower Court in the course of which he says :—

“ While the complaint was pending I had a talk with Jamal-ud-din that, if Ghulam Mohiy-ud-din will not settle the matter, the result will be bad for him. By settling the matter above referred to I mean settlement of accounts between the parties. The real object of my talk with Jamal-ud-din was that, if the accounts were settled, I will have the complaint withdrawn. . . .” (page 36). “ On the 30th April 1909 Jamal-ud-din met the parties in Court at 9 a. m. Hakim Narsingh Das was also present in the Court at the time. *Hundies* and other documents were executed on the same day in the Court compound. Rs. 10,000 were given by the defendant to plaintiff’s father, Hakim Narsingh Das, deceased. The money was deposited with the cashier of the Government Treasury as a trust (*aminat*) on the condition that, after the acceptance of the withdrawal of the complaint by the Court, the money may be paid to Narsingh Das. In case of non-acceptance of the withdrawal Ghulam Mohiy-ud-din shall get back the money Had I not acquiesced in the withdrawal of the complaint, the defendant could not have agreed to the execution of *Hundies*, &c., and the payment of cash money.” Again at page 37 the witness says :— “ Jamal-ud-din handed over the *Hundies* and other documents to Hakim Narsingh Das in presence of the defendant after the withdrawal was accepted. From there the parties came to the Treasury. The defendant was with us. On the direction of the defendant the money was paid to Hakim Narsingh Das by the Treasurer.” In re-examination the witness states : (page 38) : “ Hakim Narsingh Das had obtained a *rukqa* from the Treasurer regarding the deposit which was made in favour of Hakim Narsingh Das, and the Treasurer paid over the money to Hakim Narsingh Das on getting back the *rukqa* and the directions of Ghulam Mohiy-ud-din.”

Jamal-ud-din in his statement says (page 33) :— “ Had it not been for the criminal case the plaintiffs would not have got what they wanted and the defendant would not have executed what he did. All the documents were executed on the day that I made the copy of the accounts. The rupees and *Hundies* were lodged with Lala Gopal Sahai on the condition that they would be handed over when the settlement of the case was produced. This compromise was effected that same day.”

Ghulam Ghaus was not in the service of the sons of Narsingh Das when he gave his evidence in the lower Court, but there is nothing whatever in his cross-examination to show that he was in any way hostile to them; and since he had special knowledge of the circumstances under which the settlement had taken place between the appellant and Hakim Narsingh Das and the criminal prosecution withdrawn, his evidence on the point is of special significance. Similarly, the evidence of Jamal-ud-din who acted practically as an arbitrator between the parties and got them to come to terms is important and no ground whatever exists for questioning his veracity. The account of the settlement given by Jamal-ud-din is fully borne out by the contents of :—

(1) Exhibit P. 3, the registered deed of dissolution of partnership, dated 30th April 1909.

(2) Exhibit P. 4, the bond executed on the same date by the appellant in favour of Narsingh Das and Gopal Das for Rs. 8,221-8-10, and

(3) Exhibit P. 5, which is a copy of an abstract of accounts between the parties, (pages 410 of the paper-book); and of these documents, exhibits P. 3 and P. 4 bear the signatures of Jamal-ud-din. There is every reason, therefore, for believing the evidence of both Ghulam Ghaus and Jamal-ud-din as to the circumstances under which the appellant and Narsingh Das composed their differences and the criminal prosecution was withdrawn; and we do not agree with the District Judge when he discredits Ghulam Ghaus, simply on the ground that his evidence does not agree with that of Jamal-ud-din as to the dates on which the latter was present at Multan.

The District Judge in his judgment says :—

“ It is clear that the defendant acted with due deliberation—
“ presumably under legal advice, executed the promissory notes
“ and made payment in cash for what was found due by him
“ after a lengthy examination of the accounts extending over
“ several days, and that he did not act under undue influence,
“ nor made the payment and executed the promissory notes in
“ consideration of the abandonment of the criminal proceed-
“ ings” (page 42 of the paper book). Here the District
Judge has missed the real point. The question is not whether
the accounts between the parties had been gone into and the
appellant had understood them or not, but whether the promise
to withdraw the criminal prosecution by Hakim Narsingh Das
was or was not part of the consideration of the agreement
made by the appellant with Narsingh Das as to the payment

of a certain sum of money to the latter which agreement was embodied in the promissory notes in suit and in pursuance of which Rs. 10,000 in cash were deposited with the Government Treasurer at Multan. The facts which have been relied upon by the District Judge and by the respondent's counsel before us, namely, that the accounts were gone into by Jamal-ud-din, that the compromise was discussed for two or three days, and that the appellant, after due deliberation, admitted his liability to Narsingh Das in a certain sum and agreed to pay the same in cash and promissory notes and a bond, cannot make the agreement between the parties as embodied in the promissory notes lawful, if the object or consideration of that agreement was wholly or in part the withdrawal of the prosecution for an offence which was in law non-compoundable. That that was the object of the agreement is, in our opinion, fully established by the evidence of Ghulam Ghaus and Jamal-ud-din, and, apart from that evidence, this is borne out by the probabilities of the case.

The respondent's counsel has argued that the criminal case against appellant was withdrawn because (1) Narsingh Das was satisfied that the appellant's intention had not been dishonest and on going into the accounts the latter had expressed his readiness to pay the money due by him, (2) there was not sufficient evidence to bring the offence under section 406, Indian Penal Code, home to the appellant, and the dispute being one of a civil nature, the case, if prosecuted, would have fallen through for want of proof of a criminal intent. We cannot agree in this view. The circumstances of the case and the evidence on the record fully bear out the contention of Pandit Sheo Narain that it was the agreement by Narsingh Das not to go on with the criminal prosecution then pending in the Magistrate's Court which induced the appellant to accept the settlement of accounts between him and Hakim Narsingh Das as effected by Jamal-ud-din and that if, for some reason or other, the criminal prosecution had not been withdrawn the promissory notes in question would not have been handed over to Narsingh Das nor would he have been paid Rs. 10,000 cash which were deposited by the appellant with the Government Treasurer pending the conclusion of the criminal proceedings.

A number of authorities were cited to us on both sides. The appellant's advocate relied upon Pollock's Indian Contract Act, (3rd edition, page 135) *I. L. R. XI Bom. 566 (1)*, *I. L. R.*

(1) (1887) *I. L. R. 11 Bom. 566 (Kessowji v. Hurjiwan)*.

28 Bom 326 (1), 5 *Indian Cases*, page 98 (2), 16 C. W. N., page 854 (3), 135 P. R. 1882 (4), I. L. R. 28 All. 718 (5), 9 P. R. 1906 (6), and 31 P. R. 1911 (7). We think it unnecessary to discuss these authorities, as the principle of law underlying section 23 of the Contract Act, which is applicable to cases like the present, does not admit of any doubt, the sole question in each case being whether or not the facts admitted or established show that the commission of a non-compoundable offence was the consideration, in whole or in part, of an agreement between the parties.

The authorities relied upon by the respondent's counsel are distinguishable from the present case. In I. L. R. 28 All. p. 718 (5), there was no agreement whatever to stifle the criminal prosecution, for the simple reason that no criminal prosecution was, as a matter of fact, pending at the time when the promissory note in dispute in that case was executed. In 9 P. R. 1906 (6), there was only a threat of prosecution, but there was no agreement by the party in whose favour the promissory note was executed not to prosecute the executant thereof (page 35 of the Report). In 31 P. R. 1911 (7), it would appear from the judgment that Sardar Kalwant Singh, who executed the mortgage-deed there sued upon, had executed and handed over the deed to the mortgagee before the criminal prosecution launched by the latter against him was terminated by the complaint being dismissed in default. The completion of the contract of mortgage by the delivery of the deed to the mortgagee was not made contingent upon the complaint being dismissed or the mortgagor being discharged by the Magistrate; the mortgage was completed and the deed was handed over to the complainant independently of the result of the criminal prosecution, though the necessary consequence of the complainant being satisfied once the deed of mortgage was executed in his favour was that he did not appear in the Magistrate's Court and therefore the complaint was dismissed in default.

In the present case the facts found are quite different; the promissory notes in suit, though executed before the withdrawal of the prosecution, were not handed over to

(1) (1904) I. L. R. 28 Bom. 326 (*Dalsukhram v. De Bretton*).

(2) (1909) 5 *Indian Cases* 98 (*Charan Purkait v. Amrita Lal*).

(3) (1912) 16 Cal. W. N. 854 (*Majibar Rahman v. Mukhtashed Hossain*).

(4) 135 P. R. 1882 (*Masjidi v. Mussammam Ayisha*).

(5) (1906) I. L. R. 28 All. 718 (*Jai Kumar v. Gauri Nath*).

(6) 9 P. R. 1906 (*Nanak Chand v. Durant*).

(7) 31 P. R. 1911 (*Karm Chand v. Mussammam Basant Kaur*).

Narsingh Das till after the prosecution had been withdrawn, and the withdrawal thereof accepted by the Magistrate; and there was a distinct agreement to the effect that the promissory notes will not be handed over to Hakim Narsingh Das unless the appellant was discharged by the Magistrate. In this case therefore the consideration for the promissory notes was clearly the agreement to compound an offence which by law was not compoundable and it was therefore unlawful within the meaning of section 23 of the Contract Act.

For the foregoing reasons, we hold that the promissory notes sued upon were void and unenforceable; and we therefore accept this appeal and, setting aside the decree of the District Judge, we dismiss the suit *in toto*. In the peculiar circumstances of the case, we think that the ends of justice will be met by ordering the parties to bear their own costs throughout, and we direct accordingly.

Appeal accepted.

— — —
No. 40.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Beadon,

MUTSADDI SINGH AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

NARAINA—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 676 of 1910.

Custom—succession—by appointed heir collaterally in adoptive father's family—Jats of Tehsil Jagraon, Ludhiana district—Rincaj-i-am.

Held, that where an appointed heir loses all rights of collateral succession in his own natural family, custom often recognises his right to collateral succession in the family of the person who appointed him heir.

103 P. R. 1909 (1), referred to.

But held, that it had not been proved that by custom among Jats of Tehsil Jagraon, Ludhiana District, an appointed heir is disentitled to succeed collaterally in his natural family, and that consequently the ordinary rule applies, viz., that he is not entitled to succeed collaterally in his adoptive father's family.

Further appeal from the decree of T. P. Ellis, Esquire, Divisional Judge, Ludhiana Division, at Ludhiana, dated 15th May 1910.

Muhammad Din, for Appellants.

Muhammad Iqbal, for Respondent.

The judgment of the Court was delivered by—

RATTIGAN, J.—The parties are Jats of *Tehsil Jagraon*, Ludhiana District, and the sole question before us is, whether an appointed heir is entitled by custom to succeed collaterally to property left by the nephew of the person who appointed him heir in the presence and to the prejudice of the collateral heirs of the deceased. The general rule, no doubt, is that an appointed heir does not succeed collaterally in the family of the person who appointed him such heir and the reason for this rule is presumably the other rule, also of almost universal applicability throughout the province, that a person who has been appointed heir in one family does not lose his right of succession collaterally in the family of his natural father. It may well be, therefore, that in cases where custom does not recognise the latter rule, that is to say, where the appointed heir loses all right of collateral succession in his own natural family, that custom would recognise his right to collateral succession in the family of the person who appointed him heir (See No. 103 *P. R.* 1909) (1).

6th Jan. 1914.

In the present instance the Divisional Judge has dismissed the claim of the plaintiffs, who are collateral heirs of Naraina, the deceased proprietor, on the ground that by custom in the Jagraon *Tehsil* a collateral adoptee by his adoption loses his right of succession directly and collaterally in his natural family. We are unable ourselves to find any proof of such custom on the record and the *Riwaj-i-am* of the *Tehsil* referred to by the Divisional Judge merely states, that a person who is appointed heir in another family loses his right to succeed to his natural father as against his natural brothers. This is, of course, a very different proposition and in no way precludes such person from claiming to succeed to his paternal uncle.

In the present case the defendant stated, on solemn affirmation in the lower appellate Court, that he was relinquishing all rights to succeed to his natural father. As he is said to have three natural brothers living his right to succeed to Lallu, his natural father, would appear to be exceedingly remote and in any event this statement of his would not necessarily debar him from claiming to succeed to Lallu, and it certainly would not prevent him from claiming collateral succession in Lallu's family. Nor, again, would it in all probability be held binding on the defendant's descendants.

As we are not satisfied that defendant is disentitled to succeed collaterally in his natural family, we must

(1) 103 *P. R.* 1909 (*Dial Singh v. Sewa Singh*).

hold that the ordinary rule applies, and that he has no right to succeed to Naraina in the presence of Naraina's, collaterals. We accordingly accept the appeal and restore the decree of the Munsif, 1st class. Respondent must pay costs throughout.

Appeal accepted.

No. 41.

*Before Hon. Mr. Justice Rattigan and
Hon. Mr. Justice Beadon.*

JIWAN SINGH AND OTHERS—(DEFENDANTS)—
APPELLANTS

Versus

MUSSAMMAT HAR KAUR—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 770 of 1910.

Custom—succession—ancestral property—daughter or collaterals in 11th degree—onus probandi.

Held, that under customary law, where collaterals more distantly related than the fifth, or at any rate the seventh degree, claim to succeed to ancestral property in preference to a daughter, the onus probandi is on them.

5 P. P. 1908 (1) and 86 P. R. 1908 (2), approved.

48 P. R. 1889 (3) and 75 P. R. 1898, referred to.

Further appeal from the decree of A. H. Parker, Esquire, Divisional Judge, Gujranwala Division, at Lahore, dated 7th March 1910.

Beechey, for Appellants.

Kharak Singh, for Respondents.

The judgment of the Court was delivered by—

8th Jany. 1914.

RATTIGAN, J.—The defendants in this case are Wirk Jats of Tahsil Gujranwala and the dispute relates to 350 *kinals* of land left by one Dhian Singh. Plaintiff is the daughter of the deceased and is alleged to have married a Jat of another *Gol*. The question at issue between the parties is, whether the plaintiff excludes the defendants who are related to the deceased proprietor in the eleventh degree. The Courts below have concurred in granting plaintiff the decree for which she prayed, though they also held that the land had descended from the common ancestor of Dhian Singh and defendants. The latter have appealed to this Court and the plaintiff has filed certain cross-objections taking exception to the finding that the land was ancestral.

(1) 5 P. R. 1908 (*Abdul Karim v. Sahib Jan*).

(2) 86 P. R. 1908 (*Bholi v. Man Singh*).

(3) 48 P. R. 1889 (*Gurditta v. Mussammat Preman*).

(4) 75 P. R. 1898 (*Arur Singh v. Mussammat Lachmi*).

As regards the latter point we may say at once that the express mention of Sohan Singh in the pedigree-table is presumptive proof that the land descended from him and we see no reason therefore to differ from the finding of the courts below.

As regards the defendants' appeal Mr. Beechey contends that in all cases of this kind the *onus* of proving that a female succeeds in the presence of collaterals, no matter how remote the latter may be, must necessarily rest upon the person who asserts that proposition. Customary Law being founded on strict agnatic principles the rule must, according to Mr. Beechey, necessarily be the same, whether the collateral who is opposing the daughter is related in the second or the twentieth degree. In support of his argument the learned counsel has referred us to No. 48 *P. R.* of 1889 (1), No. 75 *P. R.* of 1898 (2), and to Tribal Law, pages 64 and 65. No doubt the authorities are not altogether in harmony upon this question of the *onus probandi* in such cases, but the weight of authority and certainly the more recent decisions are distinctly in favour of the contention that the *onus* lies on collaterals more distantly related than the fifth or, at any rate, the seventh degree to show that they are entitled to succeed in preference to a daughter of the deceased. The whole question is elaborately considered in No. 5 *P. R.* 1908 (3), and No. 86 *P. R.* 1908 (4), and it is unnecessary for us to say more than that we entirely agree with those decisions. We accordingly reject this appeal with costs.

Appeal dismissed.

No. 42.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge
and Hon. Mr. Justice Kensington.*

JAMUN RAM—(PLAINTIFF)—APPELLANT

Versus

KISHEN RAM AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1293 of 1911.

Civil Procedure Code, 1908, section 17 and order 21, rule 2—suit for a declaration that a decree has been satisfied and should not be executed against plaintiff.

Held, that a suit for a declaration that a decree obtained by the defendant against plaintiff's father and others has been satisfied, so far as it concerned the plaintiff and his father, and consequently should not be executed against

(1) 48 *P. R.* 1889 (*Gurditta v. Mussammat Preman*).

(2) 75 *P. R.* 1898 (*Arur Singh v. Mussammat Lachmi*).

(3) 5 *P. R.* 1908 (*Abdul Karim v. Sahib Jan*).

(4) 86 *P. R.* 1908 (*Bholi v. Man Singh*).

the plaintiff does lie and section 47, or order 21 rule 2 of the Code of Civil Procedure are no bar to it.

16 P. R. 1910 (1), explained and followed.

*Miscellaneous first appeal from the decree of Mirza Zaffar Ali,
District Judge, Multan, dated the 9th October 1911.*

Badr-ud-din, for Appellant.

Nanak Chand, for Respondents.

The judgment of the Court was delivered by—

9th Jany. 1914.

SIR ARTHUR REID, C. J.—The plaintiff-appellant sued for a declaration that a decree in favour of the defendant respondents 1 and 2, passed on the 11th June 1906 against the plaintiff's father and others, had been satisfied, so far as it concerned the plaintiff and his father, and consequently should not be executed against the plaintiff. The Court below confused the question of satisfaction with the question, whether the suit lay, held that section 47 of the Code of Civil Procedure was a bar to the suit, and distinguished the facts before it from those dealt with in 16 P. R. 1910 (1), on the ground that in the case cited it was found as a fact that the decree had been satisfied and that the judgment-debtor was consequently entitled to file a regular suit to establish satisfaction, in case it could not be recognised under section 258 of the old Code (order XXI, rule 2, of the present Code).

This distinction is erroneous. In that case the judgment-debtor sued for a declaration that the decree had been satisfied and could no longer be executed. The suit was dismissed on an authority of the Calcutta Court from which this Court differed, and the suit was remanded by this Court for decision on the merits, the Court holding that the suit lay. The question, whether the decree had or had not been satisfied, had nothing to do with this Court's decision and the ruling is therefore directly in point and supports the appeal.

There is no force in the contentions of counsel for respondents that the plaint contained no allegation of the satisfaction of the decree and that section 47 of the Code of Civil Procedure bars the suit. The lower Court professed to deal only with the preliminary issue framed on the 16th August 1911 at page 14 of the paper book—"whether the present suit can lie or "whether section 47 of the Code of Civil Procedure operates as "a bar" and then proceeded apparently to assist it in deciding that issue, to consider the suit on the merits, without giving plaintiff-appellant an opportunity of adducing evidence, and

(1) 16 P. R. 1910 (*Dewan Singh v. Amir Singh*).

appears to have based its decision on the merits merely on an examination of the execution records.

For these reasons we decree the appeal, set aside the decree of the Court below and remand the suit under order XLI, rule 23, of the Code of Civil Procedure, for disposal in accordance with law. Court-fee on the memorandum of appeal here will be refunded and other costs will be costs in the cause.

Appeal decreed.

No. 43.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Bradon.*

KHAIR DIN—(PLAINTIFF)—APPELLANT

Versus

GHULAM MOHI-UD-DIN—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 141 of 1911.

Punjab Pre-emption Act, II of 1905, section 12—preference to pre-emptor, a collateral of vendor who is also a co-sharer, over a mere collateral in same degree—whether it applies to the shamilat appertaining to the khatas sold in which the vendee is also a co-sharer.

Held, that a collateral who is also a co-sharer in the land sold has a preferential right of pre-emption to a vendee-collateral equally related to the vendor.

Held further, that this preferential right extends also to the *shamilat* appertaining or accessory to the land sold, although the vendee is a co-sharer in the general *shamilat deh*.

Further Appeal from the decree of H. Harcourt, Esquire, Divisional Judge, Sialkot Division, dated 8th December 1910.

Shahab-ud-din, for appellant.

Shadi Lal, for respondent.

The judgment of the Court was delivered by—

RATTIGAN, J.—Plaintiff's suit for pre-emption has been dismissed by the Divisional Judge on the ground that the pre-emptor and the vendor are both equally related to the vendor. The learned Judge adds that "that of course ends the case". As a matter of fact, the pre-emptor had alleged that he was not only an agnate, but also a co-sharer with the vendor in the land sold and, though this allegation was denied, it was necessary for the Court to decide it and, had it found in favour of the plaintiff, to grant him a decree for pre-emption.

12th Jan'y. 1914.

Mr. Shadi Lal for the respondent admits that he cannot support the judgment of the lower Appellate Court. It would have been necessary for us, in these circumstances, to remand the case for determination of the appeal before the Divisional Judge on the merits, but we find it unnecessary to do so, inasmuch as it has now been definitely established that the plaintiff is a co-sharer by purchase in the land sold and his counsel on his behalf has agreed to pay the full price stated in the sale-deed plus the Rs. 302, assessed by the Commissioner, as compensation in respect of improvements to the well.

The sole question that now remains is, whether there is any force in Mr. Shadi Lal's contention that plaintiff, though a co-sharer in the *khatus* sold, cannot claim any right in the *shamilat* appertaining or accessory to these *khatus* because the vendee himself happens to be a co-sharer in the joint *shamilat* of the village. In our opinion, this contention has no force. Plaintiff claims to pre-empt the land actually sold and with that land necessarily goes a share in the common land of the village. When partition takes place the person, for the time being owner of the *khatus* sold, will necessarily be allotted his proportionate share in the common land. And to hold that the vendee, though obliged to give up the actual *khatus*, can, nevertheless, assert a right to take the *shamilat* appurtenant to these *khatus*, would be a proposition both novel and subversive of all customary ideas with regard to the tenure of land in villages. It would, moreover, practically convert every proprietor in the village into a co-sharer for the purpose of depriving a pre-emptor of his share in the *shamilat*, which would go with the land which he obtains by right of pre-emption.

We accordingly accept this appeal and, setting aside the order of the Divisional Judge, grant plaintiff a decree for pre-emption on payment of Rs. 100 plus Rs. 302, and direct that he be given possession if this money is paid within six weeks from this date. If it is so paid, the parties will bear their own costs throughout. If, however, the money is not paid within the said period, we direct that the plaintiff's suit shall stand dismissed with costs in all the Courts.

Appeal accepted.

No. 44.

*Before Hon. Mr. Justice Johnstone and Hon. Mr.
Justice Chervis.*

BJR SINGH AND OTHERS—PLAINTIFFS

Versus

KAHAN SINGH AND OTHERS—DEFENDANTS.

Civil Reference No. 49 of 1913.

*Jurisdiction—Civil or Revenue Court—Punjab Tenancy Act, XVI
1887, section 77 (3) (i).*

Plaintiffs sued the defendants for possession of the land in suit for the purpose of using it as a threshing floor. Plaintiffs were admittedly occupancy tenants of other land, of which the defendants were their landlords, and they (plaintiffs) claimed that it was in consequence of their holding their occupancy rights that they were entitled to use the land in suit (which was formerly *shamilat* land and had now passed to defendants on partition) as a threshing floor.

Held, that the suit was one between landlord and tenant arising out of the conditions on which the tenancy is held within the meaning of section 77 (3) (i) of the Tenancy Act and was consequently within the jurisdiction of the Revenue Courts.

I. L. R. 16 All. 181 (1), referred to.

Case referred by Lt.-Col. F. Popham Young, C.I.E., Commissioner of the Jullundur Division, with his No. 5422, dated 10th September 1913.

Nemo, for plaintiffs.

Nemo, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—In this case the Munsif in whose Court it was instituted stated in his order returning the plaint for presentation in a Revenue Court that — 13th Jan. 1913.

“The plaintiffs are occupancy tenants and the defendants are their landlords. The plaintiffs allege that they have been using the land in suit as a threshing floor in their capacity as occupancy tenants, and that therefore the land in suit is part of the land held by them as occupancy tenants.”

The Munsif cited section 77 (3) (i), Tenancy Act, as authority for holding the suit to be one for a Revenue Court; that is, he found the suit was one between landlord and tenant arising out of the conditions on which plaintiffs' occupancy rights are held

Before the Assistant Collector, 1st grade, who next had to deal with the case, apparently plaintiffs' pleader admitted that

(1) (1894) *I. L. R. 16 All. 181 (Dalel v. Bhajju)*.

the relation of landlord and tenant did not exist between the parties in regard to the land *in suit*, but argued that, so long as plaintiffs were occupancy tenants in the village, they were entitled to possession and use of the land in suit, which was *shamilat-i-deh*, but has passed to defendants on partition, as a threshing floor, as being such tenants. The Assistant Collector says he accepts this version of the claim and finds on it that the suit is a civil one.

In this both the Collector and the Commissioner agree with him, and thus a reference under section 99, Tenancy Act, reaches this Court. The Commissioner concedes that the plaintiffs are occupancy tenants of certain lands in the village, and that the defendants are their landlords, *qua* those lands. He then puts the case of the plaintiffs thus :—

“ The plaintiffs allege that for many long years they have “ used jointly with the defendants a piece of ground which was “ formerly *shamilat*, but has now passed on partition to defendants as a threshing floor and granary. They state that the “ defendants have recently prevented them from using this “ piece of land in this way. and ask that possession may be “ decreed to them.”

Upon this the Commissioner holds that the claim is one for an easement gained “ by long and unchallenged possession ” and so a civil suit.

We are unable to agree with the Revenue Courts. We agree with the Commissioner that the plaintiffs are not occupancy tenants of the land in suit in the sense that, when in possession, they could plough it up ; and thus there may be some force in the contention that at least clause (g) of section 77 (3), Tenancy Act, is not applicable ; but defendants are landlords and plaintiffs occupancy tenants of other land in the village, and it is alleged by plaintiffs that it is in consequence of their holding those occupancy rights that they are entitled to the use of the land in suit as a threshing floor. They ask for “ possession.” but they ask for it for the specific purpose of using it as a threshing floor. If this is not a suit “ between “ landlord and tenant ” arising out of the conditions of plaintiffs occupancy tenancy, it is difficult to see to what classes of suits clause (i) aforesaid could possibly apply.

I. L. R. 16 All. 181 (1) is a useful judgment in connection with this question.

We rule that the suit is one for a Revenue Court, and we direct the return of the plaint to the plaintiffs for presentation in the Court of an Assistant Collector, 1st grade.

No. 45.

*Before Hon. Mr. Justice Johnstone and Hon. Mr.
Justice Chevis.*

AKBAR AND OTHERS—(PLAINTIFFS)—APPELLANTS

Versus

TABU AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 251 of 1911.

Adverse possession—by one co-sharer in joint holding—entry in Revenue Record of all co-sharers.

Plaintiffs sued for a declaration that notwithstanding that in the Revenue Records, defendants were shewn as owning 89³/₄rd shares out of 1,220 shares in *khewat* No. 12, in reality defendants owned no shares and the plaintiffs based their claim not only on an assertion of title, but on an allegation of long adverse possession.

In 1891 certain persons, including some of the present plaintiffs, applied for partition of this very land and, in doing so, denied defendants' right to a share in it; they were told to bring a civil suit.

This they did on 6th April 1891 and that suit was ultimately dismissed in 1897 on the ground that plaintiffs had not yet acquired a title by adverse possession. In 1907 some defendants brought a suit for partition on the basis of the entries in the Revenue Records, plaintiffs objected that the entries did not represent the real facts and then filed the present suit. Plaintiffs were found to have been alone in possession since 1891, to date of suit, February 1908.

Held, that possession of one co-sharer is ordinary possession of all the co-sharers, but the co-sharer in possession can convert his possession into adverse possession by an overt act showing unequivocally to the co-sharers that in future he intends to hold for himself alone and this adverse possession so begun cannot be stopped by the other co-sharers merely by affirmation that they are co-sharers or by mere applications for partition.

120 P. R. 1908 (1), referred to.

The mere retention by the Revenue authorities of the names of the co-sharers as such after the overt act does not prevent limitation from running against them.

I. L. R. 29 Bom. 300 (2), referred to.

Nor does a decree in their favour, not accompanied by actual effective assertion of rights and taking of possession of these rights, help them.

9 Indian Cases 795 (3), referred to.

(1) 120 P. R. 1908 (*Ram Chand v. Kirpa Ram*).

(2) (1905) I. L. R. 29 Bom. 300 (*Gangadhar v. Parashram*).

(3) (1911) 9 Indian Cases 795 (*Puthia Valappil v. Lakshman*).

Held also, that in the present case the overt acts, that is to say, the declarations of exclusive title in 1891 and 1894, were unmistakable, and that plaintiffs had accordingly acquired title by adverse possession before the date when the present suit was brought.

Further appeal from the decree of P. D. Agnew, Esquire, Divisional Judge, Gujranwala, dated the 26th November 1910.

Muhammad Shafi, Balwant Rai and Parduman Das, for appellants.

Sangam Lal, for respondents.

The judgment of the Court was delivered by—

21st Jan. 1914.

JOHNSTONE, J.—In this case two of the respondents were chosen to represent the rest, and those two have been served. A respondent, Mussammat Fatima, died long ago, but Mr. Sangam Lal agrees that the case can go on without her.

In their plaint a number of plaintiffs sued for a declaration that, notwithstanding that in the Revenue Records defendants 1 to 38 were shown as owning 89 $\frac{3}{4}$ rd. shares out of 1,220 shares in *khevat* No. 12, a large area of 24,725 *kanals* 18 *marlas*, in reality those defendants owned no shares, and the plaintiffs based their claim not only on an assertion of title, but on an allegation of long adverse possession. Of the 38 real defendants, 29 confessed judgment at once, and 3 more later confessed judgment, but withdrew their confession, and it is clear enough as the Courts below have seen that Tabu, defendant, alone who owns between 2 and 3 shares only is the right antagonist of the plaintiffs. His contentions in the first Court were that he and his comrades had been in possession along with plaintiffs, that plaintiffs' possession had not been adverse, that a similar claim had been already made by plaintiffs and had been dismissed, and that some of the defendants had actually obtained partition of their shares.

The occasion for the bringing of this suit was an application in 1907 by some defendants for partition on the basis of the entries in the Revenue Records, plaintiffs objecting that the entries did not represent the real facts.

The first court found for plaintiffs on the score of a title matured by over 12 years' adverse possession. The first court noted that some of the defendants did undoubtedly get some share by partition, but that it did not follow that the other defendants, who had now lost their rights, if any, by the operation of the law of limitation, should also get shares.

When the defendants, or some of them, appealed to the Divisional Court, that Court took a different view, and dismiss-

ed the plaintiffs' claim, and plaintiffs have now come up here on further appeal. In our opinion this appeal must succeed.

There is little or no doubt as regards the facts. In 1891 certain persons, including some of the present plaintiffs, applied for partition of this very land, and in doing so denied defendants' right to a share, and were told to bring a civil suit. This they did on 6th April 1894, and that suit was ultimately dismissed in 1897 on the ground that plaintiffs had not yet acquired a title by adverse possession. In 1907 Labu, defendant aforesaid, applied for partition, as already stated. All that time plaintiffs alone were in possession : this is patent on the record, and Mr. Sangam Lal has not been able to show us a particle of evidence to the contrary on the record. It is idle of him to point to certain *khasra* numbers said to have been cultivated by Labu and other defendants in 1895-1896, for those persons cultivated those fields as tenants of plaintiffs, and are shown in the papers as actually paying *batui* thereon.

In these circumstances it seems to us clear enough that plaintiffs' adverse possession, beginning in 1891, though not sufficiently long in 1894 and 1897 to warrant a decree in their favour, continued uninterrupted until the date of the institution of the present suit, 9th February 1908, a period more than sufficient for plaintiffs' purpose.

The first part of the lower appellate Court's judgment is all in favour of plaintiffs. Mr. Agnew held that the decree of 1894 does not operate as *res judicata* here and does not prevent plaintiffs from trying to prove the acquisition of a title by adverse possession since 1894 ; and he rightly went on to note that, in view of 120 P. R. 1908 (1), the land in suit being joint property, it was for plaintiffs to establish in the clearest way " their adverse possession or abandonment by the contesting defendants." (We may say at once that plaintiffs never pleaded abandonment by defendants, and that no such matter appears to us to arise in the case).

Then Mr. Agnew recognised the fact of plaintiffs' exclusive possession since 1891 ; but he could not see how 1891 was the starting point for adverse possession, inasmuch as any assertion of adverse possession then made was " contradicted " by the " decree of 1894," which remained " unchallenged " and his final opinion is that adverse possession at the soonest began in 1897, when the previous suit finally failed, and that even this adverse possession was interrupted in 1907 by Tabu applying for partition.

(1) 120 P. R. 1908 (*Ram Chand v. Kirpa Ram*).

We cannot assent to this way of looking at the case. We agree that possession of one co-sharer is ordinarily possession of all the co-sharers ; but the co-sharer in possession can convert his possession into adverse possession by an overt act showing unequivocally to the co-sharers that in future he intends to hold for himself alone ; and this adverse possession so begun cannot be stopped by the other co-sharers, merely by affirmations that they are co-sharers or by mere applications for partition. It is the business of those co-sharers, within limitation, actually and effectually to assert their rights and to break up the usurper's exclusive possession. The mere retention by the Revenue authorities of the names of those co-sharers as such, after the aforesaid overt act has been done, does not prevent limitation from running against them—*I. L. R. 29. Bom. 300 (1)*, nor does even a decree in their favour, not accompanied by actual effective assertion of rights and taking of possession of those rights, help them—*9 Indian cases, 795 (2)*—a case apparently exactly in point. In the present case the overt acts, the declarations of exclusive title in 1891 and 1894 are unmistakable.

We need not pursue the matter further. Plaintiffs have fully made out a title by long adverse possession and must have their decree. Mr. Sangam Lal has not been able to show us any proof that any of the defendants has ever succeeded in getting a share by partition, and we need not therefore consider what the effect of such an occurrence would be.

We accept the appeal and give plaintiffs a decree in full with costs in all the Courts.

Appeal accepted.

No. 46.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Beadon.*

MUSSAMMAT FATEH NISHAN—(PLAINTIFF)—
APPELLANT

Versus

AHMAD SHAH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1137 of 1913.

Punjab Pre-emption Act, II of 1905, section 12 (b) thirdly—not applicable to a mother in regard to either a proprietary or an occupancy holding—Punjab Tenancy Act, XVI of 1887, section 59.

Held, that as a mother under customary law is not a person who would be entitled to inherit the proprietary land of her son on the latter's decease,

(1) (1905) *I. L. R. 29 Bom. 300 (Gangadhar v. Parashram).*

(2) (1911) *9 Indian Cases 795 (Puthia Valappil v. Lakshman).*

and as under section 59 of the Punjab Tenancy Act, she has no right whatever to succeed to his occupancy rights, section 12 (b) *thirdly* of the Punjab Pre-emption Act does not confer a right of pre-emption upon her in regard to either a proprietary or an occupancy holding sold by her son.

Held also, that the mother's right under Customary Law to temporary possession of her deceased son's landed property is similar to that of a widow and is a mere development of her original right to maintenance.

34 P. R. 1893 (1), referred to.

Further appeal from the decree of A. E. Martineau, Esquire, I. C. S., Divisional Judge, Rawalpindi Division, dated the 22nd April 1912.

Nabi Bakhsh, for Appellant.

Moti Lal, for Respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—The learned Divisional Judge has held that respondents have a preferential right of pre-emption, under section 12 (b) (2), to plaintiff (the mother of the vendors) whose rights, he holds, fall under section 12 (b) (3) of the Punjab Pre-emption Act. The plaintiff has appealed to this Court, and it has been pointed out to us that the learned Judge has fallen into error in stating that respondents are co-sharers with the vendor in the land sold. As a matter of fact, they are not co-sharers in the land held by the vendor as proprietor; and with regard to the land held by him as occupancy tenant, they are co-sharers merely in *khata* No. ११६, or, in other words, only in 1 *kanal* 18 *marlas* out of the total area of the land sold. As regards that small plot of land, their claim to pre-empt would, of course, fall under section 12 (b) (2), but as regards the rest of the land, they can only claim under sub-clause 3 of clause (b). At the same time, this mistake made by the Divisional Judge does not materially help the plaintiff. She is, we find, a co-sharer in the property sold, but as such she could claim only under sub-clause "*fourthly*" of clause (b). It is contended that she can also claim under sub-clause "*thirdly*" as being a person who would be entitled to inherit the property in the event of the vendor dying without an issue.

We cannot accede to this contention. In our opinion neither a mother nor a widow who obtains possession of property left by her son or husband for enjoyment during her life or any shorter period, can be regarded as an "*heir*" to that property within the meaning of Customary Law. As observed by Sir Meredyth Plowden in No. 34 P. R. 1893 (1),

(1) 34 P. R. 1893 (*Mussammal Kauri v. Jamiat Singh*).

the widow's "original right to maintenance has developed in "many tribes into a right to possession of her husband's land "for her maintenance by sufferance of the reversioners." This exactly expresses the position which a mother or a widow holds when she happens to be in temporary possession of landed property. The above remarks refer to the claim of the plaintiff so far as the proprietary lands are concerned

As regards the lands held in occupancy tenure, it is clear from section 59 of the Punjab Tenancy Act that plaintiff, as the mother of the vendor, would have no right whatever to succeed on his death. Accordingly plaintiff's right of pre-emption must fall under clause (c) sub-clause "secondly," and as such it is obviously far inferior to the right of the respondents.

In arguments before us Mr. Nabi Bakhsh urged that the land in suit was not ancestral, *qua* the respondents. This, however, is a point that was not raised in the Courts below and is not urged in the grounds of appeal filed in this Court. In the circumstances we cannot allow it to be raised now.

The result is that the plaintiff's appeal fails and is dismissed with costs.

Appeal dismissed.

No. 47.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Beadon.*

BI-HEN DAS—(DEFENDANT)—APPELLANT

Versus

MUSSAMMAT MANSA DEVI—(PLAINTIFF)—AND RAM
PARTAP—(DEFENDANT)—RESPONDENTS.

Civil Appeal No. 1577 of 1912.

Hindu Law—maintenance of step-mother after her son and her step-son have effected a partition—liability of latter.

Held, that upon the weight of authority there was no difference between the two systems of Hindu Law, the *Dayabhaga* and the *Mutakshara*, as to the relative position of a step-mother and her step-son.

1 *Cal L. J. R.* 142 (1), and *I. L. R.* 8 *Cal.* 537 (542, 513) (2), and per contra *I. L. R.* 37 *Cal.* 214 (3), *I. L. R.* 5 *Mad.* 29 (4), *I. L. R.* 5 *Mad.* 32 (5),

(1) (1905) 1 *Cal. L. J. R.* 112 (*Chowdhury Thakur Proshad v. Mussammat Bhagwati*).

(2) (1882) *I. L. R.* 8 *Cal.* 537 (542, 543) (*Damoodur Misser v. Senabuttu Misra*).

(3) (1909) *I. L. R.* 37 *Cal.* 214 (*Tahaldai Kumri v. Gaya Pershad*).

(4) (1882) *I. L. R.* 5 *Mad.* 29 (*Kumaravelu v. Virana Goundan*).

(5) (1882) *I. L. R.* 5 *Mad.* 32 (*Muttammal v. Vengalokshmiammal*).

I. L. R. 8 Mad. 107 (129) (F. B.) (1), I. L. R. 4 Bom. 188 (2), I. L. R. 2 Bom. 573 (614) (3), Bengal Law Reports Supp. Vol. Pt. I. p. 67 (F. B.) (4), I. L. R. 16 All. 221 (224) (5), 153 P. R. 1889 (6), and Trevelyan's Hindu Law (1912) p. 374, referred to.

Held accordingly, following *I. L. R. 16 Cal. 758 (P. C.) (7)*, decided on the *Dayabaga* system, that, after partition between two sons, the plaintiff being the real mother of one only, could not claim maintenance from her step-son, although, as long as the estate remained joint, her maintenance would have been a charge upon the whole estate.

*Further Appeal from the decree of L. H. Leslie Jones, Esquire,
Divisional Judge, Jullundur, dated the 1st July 1912.*

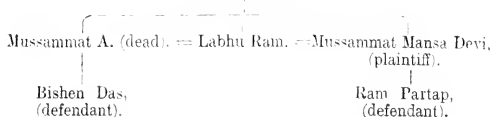
Nanak Chand, for Appellant.

Duni Chand, for Respondent.

The judgment of the Court was delivered by—

RATTIGAN, J.—The parties are Brahmans of the town of Nur Mahal in the Jullundur District and follow the *Mitakshara* system of Hindu Law. The following table will help to explain the questions involved in this appeal:—

BUDHA MAL.



Labhu Ram, plaintiff's husband, predeceased his father, Budha Mal, and died many years ago. After his death Mussammat Mansa Devi was maintained by Budha Mal and on the death of the latter received the same amount of maintenance, *viz.*, Rs. 25 per mensem from the guardians of the two minors, Bishen Das and Ram Partap. The two latter came of age a short time ago, and thereafter partitioned *inter se* the joint property which they had inherited from their grand-father Budha Mal. It appears to be a very valuable property and it is not suggested that the sum of Rs. 25 a month as maintenance for the plaintiff is excessive. In the present suit she claims to receive this maintenance from both her step-son, Bishen Das, and her son, Ram Partap. The latter admitted the claim and expressed his willingness to contribute half of the allowance provided his step-brother agreed to pay the other half.

30th Jan. 1914.

(1) (1884) *I. L. R. 8 Mad. 107 (129) (F.B.) (Maji v. Chinnammal)*.

(2) (1879) *I. L. R. 4 Bom. 188 (Kesserbai v. Valab Raoji)*.

(3) (1878) *I. L. R. 2 Bom. 573 (614) (F.B.) (Savitribai v. Luximibai)*.

(4) (1864) *Bengal Law Reports Supp. Vol. Pt. I p. 67 (F. B.) (Joti Lal v. Mussammat Durani Kowar)*.

(5) (1894) *I. L. R. 16 All. 221 (224) (Rama Nand v. Surgiani)*.

(6) 153 P. R. 1889 (*Mussammat Kirpi v. Ramjas*).

(7) (1889) *I. L. R. 16 Cal. 758 (P.C.) (Hemangini Dasi v. Kedarnath)*.

The District Judge, Rai Chuni Lal, decreed the claim against defendants in equal shares, and in his judgment held that inasmuch as a mother, on a partition among her sons to which she was made no party, is entitled to have a share, equal to that of a son, set apart for her maintenance, it was clear that her maintenance was a charge on the whole estate of Budha Mal as it stood before partition between defendants, and that consequently she was entitled to claim it from both of them and to make it a charge on the estate of the deceased in the hands of each of them. He further found that about 100 *ghumous* of land in *Mauza* Gamtala had been retained as their joint property by the defendants, and that the plaintiff could, in any event, claim her allowance from that part of the estate which, according to the learned Judge, was well able to cover the maintenance allowance.

Defendant No. 1, Bishen Das, appealed to the Divisional Judge, but his appeal was dismissed on the ground that under the *Mitakshara* system of law, which differs in this respect from that of the *Dayabhaga*, a step-son is bound to contribute to his step-mother's maintenance, even after a partition has been effected between him and his step-brother. The learned Judge was also of opinion that plaintiff's claim was really that of a daughter-in-law who asks to be maintained out of the father-in-law's property, her own husband Labhu Ram having died in the lifetime of Budha Mal and having presumably been a co-parcener in the property.

Bishen Das has preferred a further appeal to this Court and the question of Hindu Law involved, *viz.*, whether under the *Mitakshara* system a step-son is bound to contribute to the maintenance of his step-mother, after a partition of the joint property has been effected between him and his step-brother (the son of his step-mother) is one that has been argued before us at some considerable length and is of no small difficulty. Their Lordships of the Privy Council in *I. L. R. 16 Cal. 758 (1)* have held that where "there are several groups of " sons, the maintenance of their mothers must, so long as the " estate remains joint, be a charge upon the whole estate, but " when a partition is made the law appears to be that their " maintenance is to be distributed in accordance with the " relationship the sons of each mother being bound to maintain " her. The step-sons are not under the same obligation." This decision was given in a case from Bengal and was obviously based on the *Dayabhaga* system.

(1) (1889) *I. L. R. 16 Cal. 758 (P. C.)* (*Hemangini Dasi v. Kedarnath*).

It is contended before us that upon this point there is a difference between the two systems of law founded on the fact that the step-mother is, according to the *Mitakshara*, regarded as the mother (*mata*) of her step-son, whereas she is not so regarded in the *Dayabhaga*. In support of this argument reference is made to para. 473 (2) of Mayne's work on Hindu Law, where it is said that the writers of the Bengal School "differ in this respect from those of the other provinces since they exclude a step-mother from the operation of the texts which speak of the share of a mother" and also to para. 566 of the same work, where the author remarks:—"The Bengal *pundits* have on several occasions asserted that the word *mata* in the *Mitakshara* includes a step-mother." Furthermore, we were referred to a passage in Golap Chandra Sarkar's "Hindu Law," at page 3-7, where the author speaks of the decision of the Privy Council as laying down an inequitable rule due to misapprehension of the *Dayabhaga*. In our opinion the ruling of Their Lordships of the Privy Council is final and authoritative upon the question which was before them for decision, and nonetheless so because it does not happen to meet with the approval of a particular writer upon Hindu Law. Nor do we consider it within our province to defend that decision against the charges brought against it by Mr. Golap Chandra Sarkar. Their Lordships' pronouncement upon a point of Hindu Law is binding upon all Courts in this country and we must, therefore, act upon it in this case unless it can be established that there is *quoad* the particular point before us, an essential difference between the *Dayabhaga* and the *Mitakshara* systems of Hindu Law.

Mr. Duni Chand for respondents was unable to cite any authority directly in point in support of his argument that the step-mother was entitled, under the *Mitakshara*, to claim maintenance from her step-son after the joint property had been partitioned between that step-son and her own son. He argued, however, that the difference did in fact exist and must necessarily exist because under the *Mitakshara* system, the step-mother was treated for all purposes as the *mata*, or mother, of her step-son. The learned Counsel relied upon the case reported in Volume I of the Calcutta Law Journal Reports, at page 142 (1), and the decision of the Calcutta High Court in

(1) (1905) 1 Cal. L. J. R. 142 (*Chowdhury Thakur Proshad v. Mussam Mat Bhagati*).

I. L. R. 8 Cal. 537 (at pp. 542, 543) (1). These authorities are certainly in his favour, but *per contra* we have an overwhelming weight of authority in support of the proposition that under the *Mitakshara* a step-mother is not regarded as *mata* or mother, and that she is not in any case an heir to her step-son, as she would be if her position were that of mother—(see *I. L. R.* 37 Cal. 214 (2), 5 *Mad.* 29 (3) and 32 (4), 8 *Mad.* 107 (*F. B.*) (5), and the opinion of *Muttusami Ayyar, J.* at p. 129; 4 *Bom.* 188 (6), 2 *Bom.* at p. 614; (7), Bengal Law Reports, Supp. Vol., Pt. I, p. 67 (*F. B.*) (8), *I. L. R.* 16 All. 221 (at p. 224) (9), and No. 153 *P. R.* 1889 (10)). To a like effect is the statement of the law given in Trevelyan's "Hindu Law" (1912) at p. 374.

There being thus upon the weight of authority no difference between the two systems of Hindu Law, the *Dayabhaga* and the *Mitakshara* as to the position and rights of a step-mother, we must decide this case in accordance with the decision of the Privy Council in the case above cited and hold that the plaintiff has, in the circumstances, no claim to be maintained by her step-son Bishen Das.

It is only necessary, in conclusion, to add a few words with regard to the Divisional Judge's remark that plaintiff is really claiming as the daughter-in-law of Budha Mal. This is an aspect of the question that apparently never struck the plaintiff herself or her legal advisers. She claims as the mother of the present holders of the estate, and rightly so, for whatever her rights may have been against Budha Mal, they can only be those of a "mother" against the defendants. The estate had passed out of the hands of Budha Mal when her suit was instituted and, in order to adjudicate upon her claims, we have to consider not what rights she may have had against her father-in-law, but what rights she actually has against the persons from whom she is claiming maintenance. As against them her claim can be based only upon the ground that she is in law their mother and as such entitled to be maintained by them.

- (1) (1882) *I. L. R.* 8 Cal. 537 (542, 543) (*Damoodur Misser v. Senabutti Missrain*).
- (2) (1909) *I. L. R.* 37 Cal. 214 (*Taholdai Kumri v. Gaya Pershad*).
- (3) (1882) *I. L. R.* 5 *Mad.* 29 (*Kumaravelu v. Virana Goundan*).
- (4) (1882) *I. L. R.* 5 *Mad.* 32 (*Muttammal v. Vengalakshmiammal*).
- (5) (1884) *I. L. R.* 8 *Mad.* 107 (129) (*F. B.*) (*Mahā v. Chinammal*).
- (6) (1879) *I. L. R.* 4 *Bom.* 188 (*Kesserbai v. Valab Raoji*).
- (7) (1878) *I. L. R.* 2 *Bom.* 573 (614) (*F. B.*) (*Savitribai v. Luzimibai*).
- (8) 1861 Bengal Law Reports Supp. Vol. Pt. I p. 67 (*F. B.*) (*Joti Lal v. Mussamat Durani Kover*).
- (9) (1894) *I. L. R.* 16 All. 221 (224) (*Rama Nand v. Surgiani*).
- (10) 153 *P. R.* 1889 (*Mussamat Kirpi v. Ramjis*).

Upon the facts and the authorities, we must hold that this claim lies against her own son Ram Partap, and not against her step-son Bishen Das.

We accordingly accept the appeal of Bishen Das and dismiss plaintiff's suit as against him. The decree awarding maintenance to the plaintiff at the rate of Rs. 25 per mensem will, therefore, stand only as against the defendant Ram Partap.

In view of the close relationship of the parties and of the difficult nature of the law point involved, we leave the parties to bear their own costs throughout.

Appeal accepted.

No. 48.

Before Hon. Mr. Justice Rattigan and Hon.

Mr. Justice Scott-Smith.

GHULAM MOHY-UD-DIN AND ANOTHER—
APPELLANTS

Versus

SECRETARY OF STATE FOR INDIA—RESPONDENT.

Civil Appeal No. 520 of 1911.

Land Acquisition Act, I of 1894, sections 18, 19, and 54—Appeal to Chief Court from order of Divisional Court rejecting reference, as application to Collector was time-barred—signature to award.

Held, that an award which is signed "A. D. Land Acquisition Officer" is sufficiently signed for the purposes of the Land Acquisition Act.

123 P. R. 1908 (1), distinguished.

Held also, that no appeal lies under section 54 of the Land Acquisition Act, from an order of the Divisional Court rejecting a reference under section 18, on the ground that the application to the Collector was time-barred under sub-section (2), clause (a) of the section.

I. L. R. 39 Cal. 393 (2), followed.

Held also, that the Collector in accepting the application after the six weeks had expired could not bind the Government nor was it open to him to waive an objection of the kind in question.

I. L. R. 30 Bom. 275 (3) and Civil Appeal No. 276 of 1913 (unpublished), followed.

Held further, that the application to the Collector, being time-barred, could not form the basis of a reference under sections 18 and 19.

(1) 123 P. R. 1908 (*MacDonald v. Secretary of State*).

(2) (1911) I. L. R. 39 Cal. 393 (*Hasun Molla v. Tasir-ul-din*).

(3) (1905) 30 Bom. 275 (*In the matter of Government and Nanu Kothare*).

First appeal from the decree of S. Wilberforce, Esquire, Additional Divisional Judge, Lahore Division, dated the 20th January 1911.

Sheo Narain, for Appellants.

Government Advocate, for Respondent.

The judgment of the Court was delivered by --

2nd Feb 1914.

RATTIGAN, J. — An award purporting to be made under the provisions of the Land Acquisition Act, 1894, was announced by the Collector on the 18th of March 1910. On the 6th of May 1910, *i.e.*, more than six weeks from the date of the said award, applications were made to the Collector requiring that the matter be referred, under section 18 of the Act, to the Court. The reference was made in due course, but at the hearing before the Court objection was taken that the applications under section 18 were time-barred under *proviso* (a) to that section, and that, consequently, there was no proper reference before the Court upon which it could adjudicate. The Divisional Judge found that the applicants were present when the award was announced and that the objection, that the application was time-barred, was good and that, consequently, the proceedings before him must fall to the ground. He accordingly dismissed the claimants' application.

The objectors have appealed to this Court, but the Government Advocate raises the preliminary objection that no appeal lies under section 54 of the Act, inasmuch as the Court below has made no award at all, but has merely dismissed the applications before it as time-barred. In support of this contention reliance is placed on *I. L. R. XXXIX, Cal. page 393 (1)*. This is an authority directly in point, and we have no hesitation in following it and in holding that the preliminary objection must be upheld.

Mr. Sheo Narain asks us, however, to deal with the case on the revision side. We are exceedingly doubtful whether we have power to do so, but we need not decide the point finally inasmuch as we are satisfied that in any event there are no grounds which would justify our interference. The grounds on which the learned Advocate asked us to interfere were :—

(1) That Rai Arjan Das, who made the award, was not a Collector within the meaning of the Land Acquisition Act.

(1) 1911, *I. L. R.* 39 Cal. 393 (*Hazun Molla v. Tasir-ud-din*).

A reference to the notification appointing Rai Arjan Das, viz., No. 871, dated the 21st September 1905, shows clearly that that officer was appointed under section 3 (c) of the Act to perform the functions of a Collector thereunder, and Mr. Sheo Narain on seeing the notification admitted that his first objection had no force.

(2) That the award did not bear the full official designation of the officer making it. As a matter of fact the award is signed "Arjan Das, Land Acquisition Officer." In our opinion this signature is sufficient for the purposes of the Act; and the objection of Mr. Sheo Narain was obviously founded upon the head note of No. 123 P. R. 1908 (1), which is incorrect and is not supported by the judgment of the Court.

(3) That the question of limitation was "waived" by the Collector, when he did not himself reject the applications under section 18 but referred them to the Court for determination. It is contended that the Collector is the Agent of the Secretary of State and that his omission to reject the application as time-barred is binding on the Government. This contention was raised and overruled in a case reported in *I. L. R. XXX, Bom. 275* (2), and the ruling of Chandavarkar, J. has been recently followed upon this point by a Division Bench of this Court in Civil Appeal No. 276 of 1913.

In our opinion, it was not open to the Collector to "waive" an objection of the kind in question, inasmuch as it is expressly enacted by statute that the application must be within the period specified. In the present case there is nothing to show that the Collector noticed that the applications before him were time-barred, and the inference is that he overlooked the point altogether. Be that as it may, we are quite clear that it was open to the Court to hold, as it did, that the applications to the Collector could not form the basis of a reference under sections 18 and 19 inasmuch as they were barred by time.

We accordingly reject this appeal with costs.

Appeal rejected.

(1) 123 P. R. 1908 (*MacDonald v. Secretary of State*).

(2) (1905) *I. L. R. 30 Bom. 275* (*In the matter of Government and Nanu Khotare*).

No. 49.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Shah Din.

FAZAL HUSAIN—(DEFENDANT)—APPELLANT.

Versus

MALIK JINDA—(PLAINTIFF)—AND OTHERS—
(DEFENDANTS)—RESPONDENTS.

Civil Appeals Nos. 111, 112 and 180 of 1912.

Punjab Pre-emption Act, 11 of 1905, section 11 proviso—whether a tarkhan and a Lohar are members of same tribe.

Held, having regard to the principle laid down in 112 P. R. 1908 (1) (p. 515), viz., that the word "tribe" as used in section 11 *proviso* of the Punjab Pre-emption Act should be construed broadly and that each case should be decided on its merits, it had not been shewn that the concurrent findings of the lower Courts that the *tarkhan* claimant belonged to the same tribe as the vendors who are *Lohars* of the same village, were incorrect.

Further appeal from the decree of E. A. Estcourt, Esquire, Divisional Judge, Attock Division, at Campbellpur, dated the 6th November 1911.

Beechey and Badr-ud-Din, for appellant.

Sheo Narain and Balwant Rai, for respondents

The judgment of the Court was delivered by—

18th Feb. 1914.

JOHNSTONE, J.—These three appeals (Nos. 111, 112 and 180 of 1912) are intimately connected, as will presently appear, and they can be conveniently disposed of in one judgment. On 19th March 1910 Fateh Din, for himself and his brother Sharaf Din, sold the land in suit to Fazal Husain. On 18th and 20th March 1911 two suits for pre-emption were started, in one of which Malik Jinda was plaintiff and in the other Ghulam Muhammad; and as usual each pre-emptor was made a defendant in his rival's suit. There is now no dispute about the price, Rs. 1,500.

The vendee admitted superior pre-emptive rights in Malik Jinda; but neither he nor Malik Jinda would concede any such rights to Ghulam Muhammad. Malik Jinda based his claim on his being a member of an agricultural tribe and a landowner in *manza* Harnauli, in which the land in suit lies, while Ghulam Muhammad says he has the right claimed inasmuch as he is of the same tribe as the vendors and is their collateral relative. The former, therefore, claims under section 11, Pre-emption Act, and the latter under the proviso to that section.

A variety of pleas was put in, and issues were drawn covering both suits, and the findings of the First Court may be summarised thus :—

- (a) Ghulam Muhammad is of same tribe as the vendors, though he is not related to them, and therefore he can exercise the right of pre-emption, as he otherwise also fulfils the terms of the *proviso* to section 11 aforesaid.
- (b) As both Malik Jinda and Ghulam Muhammad are entitled, they must share, according to the Statute and the Revenue Records, in the bargain in the following proportions, namely, Malik Jinda $\frac{8.2}{16.2}$ of the land on payment of $\frac{8.2}{16.2}$ of Rs. 1,500 aforesaid, and Ghulam Muhammad $\frac{8.0}{16.2}$ on payment of $\frac{8.0}{16.2}$ of Rs. 1,500. Three months was the period allowed for deposit.
- (c) If either pre-emptor fails to take up his bargain, the other may pay instead of him and take the whole, another three months being allowed for this further deposit.
- (d) A fifth defendant Gheba had been added by the Court, because it had been pleaded that out of the area in suit (2,541 *kanals*) 20 *kanals* had been sold to him by vendee for Rs. 40 on 13th January 1911, the deed of sale being registered just in the nick of time, on 17th March 1911. Gheba was made a defendant more than a year after registration of sale-deed in suit, but the Court got out of the difficulty by ruling that the sale to Gheba was a fiction, and that, if real, it was fraudulently concealed, no time-bar therefore supervening on this account.

In both cases Fazal Husain vendee-defendant alone appealed to the Divisional Court, Attock. That Court held that Ghulam Muhammad was not only of same "tribe" as the vendors, but was also related in some way to them; that the sale to Gheba was no fiction and was not fraudulently concealed; that therefore the claim for the 20 *kanals* sold to Gheba is barred by time. That Court on these findings gave a decree for 2,521 *kanals* (instead of 2,541), noted that the whole of the money had been paid in, and allotted shares to the two pre-emptors thus—Malik Jinda 1,276 *kanals* for Rs. 753 and Ghulam Muhammad 1,245 *kanals* for Rs. 735, Rs. 12 being deducted from Rs. 1,500 as rateable value of 20 *kanals*. Appellant-defendant vendee was cast in the costs in lower Appellate Court.

Against the decrees of the lower Appellate Court three appeals have been filed, namely, Nos. 111 and 112 of 1912 by defendant-vendee asking for dismissal of the suits, and No. 180 by Malik Jinda to have the decree of the First Court in his suit restored.

As originally filed appeal No. 111, in Malik Jinda's suit, raised only the question of time-bar, a plea which Mr. Kureshi (for appellant) admits must fail in view of the Full Bench ruling 31 P. R. 1913 (1). According to that ruling the article applicable to the case *qua* Gheba is 120, which allows 6 years; and thus the plea of time bar falls to the ground. Mr. Kureshi, however, has put in additional grounds of appeal, which were admitted by a Judge in Chambers "subject to all just exceptions." Mr. Sheo Narain, on behalf of Malik Jinda, takes the objection that, especially in view of the nature of the additional grounds, none of which were taken in the lower Appellate Court, put in here, as they were, at the eleventh hour, on 11th February 1914, more than 2 years after presentation of the appeal, they should be summarily disallowed without discussion. In this view we fully concur; and the result is that defendant-vendee's appeal in Malik Jinda's case wholly fails.

As regards his appeal in Ghulam Muhammad's case we have heard lengthy arguments from Mr. Kureshi on the matter of Ghulam Muhammad's right of pre-emption. The crux of the matter is whether Ghulam Muhammad, a *tarkhan* of *Mauza Harnauli*, can be said to belong to the same tribe as the vendors, who are *lohars* of the same village. There is no definition available of the word "tribe." The question of the meaning of the word was discussed in 112 P. R. 1908 (at p. 515) (2), and we are content to take as just the propositions there directly and implicitly laid down that the word should be construed broadly and that each case should be decided on its merits. In our opinion the question is here a pure question of fact, and the Courts below have, after examining all available evidence, concurrently found that the *lohars* and *tarkhans* of this village *Harnauli* form one tribe.

After giving the best possible attention to Mr. Kureshi's lengthy arguments on the point, we find that he has shewn us no sufficient ground for holding those concurrent findings incorrect; and we therefore accept those findings. We do not think it right to discuss those arguments in detail.

(1) 31 P. R. 1913 (F. B.) (*Karam Dad v. Ali Muhammad*).

(2) 112 P. R. 1908 p. 515 (*Ali Muhammad v. Shamon*).

The net result is that both appeals by defendant-vendee (Nos. 111 and 112) are dismissed with costs, and No. 180, appeal by Malik Jinda, *in re* Gheba's 20 *kanals* is accepted. As Ghulam Muhammad has not appealed in that connection, the decrees of the First Court, though substantially restored, are subject to a small obvious adjustment, and the decrees now given will stand thus—

Malik Jinda to get 1,296 *kanals* out of the 2,541 in suit for Rs. 765, and Ghulam Muhammad the rest, *i.e.*, 1,245 *kanals*, for Rs. 735. The whole Rs. 1,500 is said to be in Court; but in case each pre-emptor has not paid in *his own* share of the money as stated above, we allow one month from this date for completion. If either pre-emptor fails to make up the sum due from him within one month, the other takes over the whole bargain, on condition of making up, within a further period of one month, any sum still deficient. If both pre-emptors fail in this, the suit will stand dismissed with costs.

Our authority for making this adjustment is Order XLI, rule 33, Civil Procedure Code.

As to costs, as already stated, appeals 111 and 112 are dismissed with costs, while No. 180 is accepted with costs throughout, *i.e.*, defendant-vendee will pay Malik Jinda's costs in full in all the Courts. The taxing of costs for that appeal in this Court will form the subject of a special order in Chambers when the decrees have been drafted.

Appeals Nos. 111 and 112 dismissed and No. 180 accepted.

No 50.

Before Hon. Sir Alfred Kensington, Kt., Chief Judge.

AMAR SINGH—(DEFENDANT)—PETITIONER.

Versus

KARAM SINGH—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 782 of 1913.

Master and servant—condition of service to work on holidays—enforcement of penalty for non-compliance.

The rules of service under which plaintiff was engaged by the defendant in his press on monthly pay of Rs. 19 required the employee to work on holidays, including Sundays, in case of necessity, with liability to summary dismissal and forfeiture of 15 days' wages on refusal. Plaintiff failed to work on Sunday, the 19th May, when ordered to do so and was in consequence dismissed on Monday, the 20th.

Plaintiff claimed wages for 19 days, plus some overtime allowance, plus damages (pay for 15 days more) on dismissal, in all Rs. 22-4-9.

The lower Court held that servants could not be forced to work on a Sunday, it being a holiday under the Negotiable Instruments Act, and decreed pay for the whole month.

Held, that the contract under which plaintiff was bound to work on a Sunday, if so required, was valid and defendant was justified in dismissing plaintiff on the 20th May, but that the prescribed penalty of forfeiture of pay for 15 days could not be reasonably exacted.

Petition for revision of the decree of Lala Dewan Chand, Judge, Small Cause Court, Lahore, dated the 30th April 1913.

Jai Gopal, for petitioner.

Respondent, in person.

The judgment of the learned Chief Judge was as follows :—

19th Feb. 1914.

SIR ALFRED KENSINGTON, C. J.—The facts of this case are that plaintiff was employed in the defendant's printing press on a pay of Rs. 19 a month. By the printed rules for employees in the press they are required to work on holidays, including Sundays, in case of necessity, with an allowance of overtime pay if required to do this extra work, and liability to summary dismissal and forfeiture of 15 days' wages on refusal.

The plaintiff failed to work on Sunday, 19th May, when ordered to do so, and was in consequence dismissed on Monday, 20th. He claimed wages for 19 days, plus some overtime allowance, plus damages (pay for 15 days more) on dismissal, in all Rs. 22-4-9.

The Small Cause Court allowed Rs. 19-2-6, including pay for the whole month and such overtime allowance as was found due, finding that "Sunday is a holiday under "Negotiable Instruments Act, and under general law of the "land servants cannot be forced to work on that day."

The Negotiable Instruments Act has nothing to do with the matter and a vague reference to the general law of the land is equally irrelevant. Sundays are customary holidays, but it is open to any employer to stipulate to the contrary, and if his servants having accepted service on these conditions refuse to abide by their terms they must take the consequences.

This requires to be made clear in the interests of employers.

The defendant did not here act illegally in summarily dismissing the plaintiff on the 20th May, but he certainly acted harshly and the prescribed penalty of forfeiture of pay

for 15 days cannot be reasonably exacted. The Civil Courts have ample discretion to determine in any particular case whether such penalty may be justified or not. The Small Cause Court was in my opinion acting properly in declining to enforce the penalty in the present case.

But as the defendant was within his rights in dismissing plaintiff on the 20th, even though he acted harshly in so doing, the Court was not justified in requiring him to pay the plaintiff by way of damages for the period—21st to 31st May.

The revision is accordingly allowed in part. The plaintiff is allowed pay for 19 days, plus overtime allowance due to him during that period, making in round figures Rs. 12 in all. The decree in his favour is reduced to one for Rs. 12 and the parties having been both to blame for the dispute will pay their own costs throughout.

Revision accepted.

No. 51.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Beadon.*

SANGHAM LAL AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

MUNICIPAL COMMITTEE OF DELHI—(DEFENDANT)—
RESPONDENT

Civil Appeal No. 1631 of 1912.

*Highways—land taken up by Government for roads on makbuza tenure—
whether erection of octroi post on edge of road is a breach of condition of
the tenure.*

Held, that where land has been taken up by Government in accordance with the *makbuza* tenure obtaining in Delhi for a public road it is not a breach of its conditions for Government to allow a Municipal Committee to erect an octroi post thereon, such erection being clearly for a public purpose.

*Second appeal from the decree of C. L. Dundas, Esquire, Divisional
Judge, Delhi Division, dated the 8th May 1912.*

Muhammad Shafi and Shadi Lal, for Appellant.

Pestonji Dadabhai, for Respondent.

The judgment of the Court was delivered by—

BEADON, J.—The Grand Trunk Road is admittedly a 28th Jany. 1914. Government road. In 1903 the Government handed over a portion of this road to the Municipal Committee of Delhi for

management and provided a money grant to cover the annual expense of maintenance of this portion. Besides that part of the road which is actually used for traffic the road includes a strip of land on each side from which material can be dug out for repairs to the road. The Municipal Committee with the consent of Government has erected an octroi post at the edge, and within the limits of the portion of the road which has been handed over to them and the site of this octroi post is the subject of the plaintiffs-appellants' present claim against the Municipal Committee.

The site in dispute is in that part of the road which passes through the plaintiffs' village and in the Settlement and Revenue records the plaintiffs are recorded as owners with the Municipal Committee in possession. In fact, in so far as the road is within the limits of the plaintiffs' village, they are the owners of the sub-soil.

We have been referred to general principles of law relating to highways in support of the contention that on disposition of the land to any purpose other than the highway, the plaintiffs are entitled to resume it. These general principles however do not apply to the present case because we find, agreeing with the lower Courts, that the land is held in a special manner or what is locally known as the *makhuza* tenure. The Deputy Commissioner as a witness in the case has explained the nature of this special tenure, and this evidence has not been rebutted. On the contrary, this evidence is corroborated by the final report of the third Regular Settlement of the Delhi District in which at page 13 a reference is made to this special tenure, as follows :—

“ Another curious tenure is known as the *makhuza* tenure by which the State or a public body such as the District Board may with the consent of the owners take possession of land free of cost for public purposes. The tenure originated when waste land at all events had no great value and when *zamindars* did not mind land being utilised in this way, more especially for roads and canals. Now a days the *zamindars* receive payment for land so utilised because it is usually acquired outright, but in the case of land utilised as a *bund* or other land improvement which will be of advantage to the owners and villagers concerned the people willingly give up land on this tenure. It is a cardinal principle of this tenure that the State or public body must return the land if it is no longer utilised for a public purpose, a condition of the agreement which has been frequently fulfilled. The tenure

has not been definitely recognised in a Civil Court, still the custom exists beyond doubt, so in any claim for restoration of land the issue should be one of fact, *i.e.*, whether the land is still required for a public purpose or not."

We find therefore that as long as the land is used for any public purpose the plaintiffs cannot resume it. It is necessary that an octroi post should be established on the road and the use of this land for such a post is clearly a public purpose. Consequently the plaintiffs' suit has in our opinion been rightly dismissed.

We note that counsel wished to urge that the plea relating to the *makbuzat* tenure was taken at a late stage and was inconsistent with other pleas. We were however unable to hear him on this point, as it had not been taken in the grounds of appeal to the lower Appellate Court. The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 52.

*Before Hon. Mr. Justice Rattigan and Hon Mr.
Justice Scott-Smith.*

SHI GOPAL AND OTHERS—(DEFENDANTS)—APPELLANTS

Versus

MUSSAMMAT AMBA DEVI—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 854 of 1911.

Act XIII of 1855—Compensation—distribution of, among the relatives of deceased—widow, grandmother, father, mother and son adopted by widow after her husband's death—Joint Hindu family.

Held, that a son adopted by the widow after the death of the deceased is not a "child" of the deceased for the purpose of Act, XIII of 1855.

7 *Bom. H. C. R.* 113-114 (1), followed.

Held also, that the Court has under the Act full power to apportion the compensation among the members of deceased's family as it thinks fit and that it was justified in not granting any of it to a grandmother to whom no loss was occasioned by the death.

Held further, that as plaintiff, the widow was entirely dependent upon her husband and was left penniless by his death, the Court was justified in allotting to her $\frac{1}{3}$ rd of the compensation as against the father of deceased, who was himself earning Rs. 15 *per mensem* and had two sons living to whom he could look for support, if necessary.

(1) (1870) 7 *Bom. H. C. R.* 113-114 (*Vinayak Raghunath v. The Great Indian Peninsula Railway Co.*).

First appeal from the decree of A. Latifi, Esquire, District Judge, Delhi, dated 17th June 1911.

Shadi Lal, for Appellants.

Muhammad Shafi and Shah Nawaz, for Respondent.

The judgment of the Court was delivered by—

4th Feby. 1914.

RATTIGAN, J.—On the 6th May 1908 one Chhutan Lal was killed in a railway accident, and on the 12th May, the widow, Mussammat Amba Devi : the father, Shi Gopal ; the mother, Mussammat Gomti, and the grandmother, Mussammat Ram Devi, preferred a claim, through their legal adviser, for compensation under Act XIII of 1855.

The railway authorities awarded a sum of Rs. 10,000 as compensation for the loss caused to the deceased's family by his death, and the whole of this sum was admittedly received by the said Shi Gopal, on behalf of himself and the other persons thereto entitled.

In the present suit the plaintiff is the deceased's widow, and she claims to recover $\frac{2}{3}$ ds of the said sum of Rs. 10,000, on the ground that she was entirely dependent upon her husband, and that she is the person who has suffered most severely in consequence of his death.

The defendants are the father, mother and two brothers of the deceased, and one Bishen Sarup, who is alleged (by defendants) to have been adopted by plaintiff as a son to her late husband. The brothers of the deceased, and the alleged adopted son were added as co-defendants upon the application of Shi Gopal.

The pleas of the defendants were that the sum of Rs. 10,000 was realized for the benefit of a joint Hindu family of which the deceased and defendants were members ; that plaintiff was entitled merely to maintenance, or at most to $\frac{1}{3}$ th of the sum awarded ; that Shi Gopal was entitled to deduct from the said sum (a) Rs. 600 paid by him for the funeral expenses of the deceased ; (b) Rs. 400 paid to the pleader who had acted for the family in securing compensation from the Railway ; (c) Rs. 100 paid for medical aid to plaintiff after her husband's death ; and (d) Rs. 20 being the value of ornaments made over to plaintiff by Shi Gopal. It was also urged that Mussammat Ram Devi, deceased's grandmother, who was alive when compensation was given, but had died prior to suit and Bishen Sarup, the alleged adopted son, were entitled to share in the sum awarded.

Plaintiff in her replication denied that she had adopted Bishen Sarup, and upon the other points raised by defendants, joined issue.

Eight issues (page 9 of the paper-book) were originally framed by the then District Judge, but these were subsequently reframed and reduced to five by his successor, who decided the case. They run as follows :—

- “(1) Whether an adopted son is entitled to share in
“ money received as compensation under Act XIII
“ of 1855 ?
- “(2) Whether the apportionment of money paid by way
“ of compromise by a person liable under the said
“ Act is governed by the same rules as if the money
“ had been recovered by suit ?
- “(3) Whether in apportioning the amount so received as
“ compensation, the Court has power, under the Act,
“ to grant an annuity in lieu of a lump-sum to
“ any party entitled ?
- “(4) To what share of the amount received as compen-
“ sation is plaintiff entitled ?
- “(5) To what share, if any, was Mussammat Ram Devi
“ entitled, and who is her legal heir ?”

The District Judge, in his judgment, ignored the 5th issue altogether, and upon the other issues he held (1) that an adopted son is not entitled to a share ; (2) that there was no distinction under the provisions of the Act between money realized as compensation by compromise and money received after contest, and that under the said provisions, relief is granted to specified relations of the deceased and not to the joint family to which he belonged ; (3) that the said provisions did not justify the Court in awarding an annuity, in lieu of a share in the sum awarded, to any persons entitled to receive compensation, and (4) that for reasons set forth in para. 5 of the plaint, plaintiff was entitled to $\frac{2}{3}$ ds of the sum awarded. The Court further held that even after deducting “ the Rs. 400 “ alleged to have been spent on lawyers’ fees, defendants, Shi Gopal and Mussammat Gomti, will have an ample sum left “ for their maintenance,” and added they have not very long “ to live.” He refused to make any deductions on account of the expenses incurred by defendants upon the funeral of the deceased, and passed a decree for Rs. 6,666-10-8 with costs in favour of plaintiff.

Defendants have appealed to this Court from this decree, but the only points urged on their behalf are (1) that Bishen Sarup, as adopted son of the deceased, is entitled to a share in the sum awarded; (2) that Mussammatt Ram Devi, deceased's grandmother, who was alive at the time when the compensation was made, was also entitled to a share; (3) that defendants were entitled to deduct from the sum awarded, the amounts paid by Shi Gopal to the pleader through whom they recovered compensation; for the funeral expenses of the deceased; for medical aid to plaintiff, and the value of the ornaments given to her after her husband's death, and finally (4) that plaintiff was not entitled to claim $\frac{2}{3}$ rds of the compensation. Mr. Shadi Lal admitted before us at the hearing that all other points urged by defendants in the lower Court were unsustainable and were given up by him.

We proceed to deal *seriatim* with the above points.

(1) There is no proof that Bishen Sarup was adopted by plaintiff as a son to her late husband after the latter's death. Plaintiff has denied the allegation when she was examined as a witness in the case and there is no evidence to the contrary. But even if she had adopted Bishen Sarup, the case reported in volume 7 of the Bombay High Court Reports at pages 113, 114 (1) is good authority for holding that a son adopted after the death of the deceased is not "a child" of the deceased for the purposes of Act XIII of 1855. The reasons given by the Bombay High Court for arriving at this conclusion appear to us to be conclusive, and Mr. Shadi Lal, in replying to Mr. Shah Nawaz, was obliged to admit that in face of the authority cited, he could not press the claims of Bishen Sarup.

(2) Mussammatt Ram Devi was the grandmother of the deceased. She must have been a lady of very advanced age at the time of her grandson's death, and it is not denied that she was then living with her son, Shi Gopal, and was maintained by him. There is no evidence that she received any maintenance from the deceased, or that she was in any respect put to pecuniary loss by the latter's death. In these circumstances, and having regard to the fact that Act XIII of 1855 was intended to compensate families for loss occasioned by the death, through actionable wrong, of a member of the family, we are of opinion that no part of the compensation was equitably claimable by the deceased's grandmother. The Act specifies certain relatives to whom compensation is awardable, but it

(1) (1870) 7 Bom. H. C. R. 113-114 (*Vinayak Raghunath v. The Great Indian Peninsula Railway Co.*).

leaves it to the Court to grant such compensation to all, or any, of such persons, and in the present case we can see no justification for allotting any part of the compensation to the heir of Mussammat Ram Devi.

(3) We think that plaintiff must pay, from the share of the compensation to be awarded to her, a proportionate part of the amounts paid by Shi Gopal to the pleader, through whom such compensation was obtained, and for the funeral expenses of the deceased. We also hold that she must refund defendant, Shi Gopal, the Rs. 100 paid by him for medical attendance upon plaintiff after her husband's death. We see no reason to doubt that Shi Gopal paid Rs. 400 to the pleader, as he alleges, but we do not think that he expended so large a sum as Rs. 600 upon the funeral ceremonies of the deceased. In our opinion, the sum of Rs. 200 would, in all probability, represent the actual sum so expended by him.

(4) As to the amount which plaintiff should receive from the sum awarded, we agree with the District Judge that she is the person who has suffered most severely in consequence of her husband's death. She was entirely dependent upon her husband, and is now left penniless, save as regards such part of the compensation as may be given to her. On the other hand the deceased's father, Shi Gopal, is himself earning Rs. 15 *per mensem*, and he has two sons living to whom he can look for support, if necessary. In the circumstances the District Judge exercised a reasonable discretion in granting the plaintiff $\frac{2}{3}$ rds of the amount awarded by the railway as compensation.

The result of our findings is that plaintiff must deduct from the amount to be awarded to her $\frac{2}{3}$ rds of (1) the Rs. 400 pleader's fee, and of (2) the sum of Rs. 200 paid (as we find) by Shi Gopal for funeral expenses. She must also pay the sum of Rs. 100 expended on her by Shi Gopal during her illness. Thus the total amount to be deducted from her share will be Rs. 500, and she will be entitled to a decree for Rs. 6,166-10-8. Her costs in the lower Court will be in proportion to the said amount.

We accept the appeal to the extent above indicated, but as it is obvious that appellants have practically failed in their appeal, we direct that they shall pay plaintiff-respondents' costs in this Court, and we fix Rs. 250 as the sum to be paid by them to plaintiff as pleader's fee upon this appeal.

Appeal accepted in part.

No. 53.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Beadon.*

RADHA KISHEN—(PLAINTIFF)—APPELLANT.

Versus

GANGA RAM RADHA KISHEN—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1554 of 1912.

Indian Insolvency Act (1848, 11 and 12 Vic. c. 21, section 39—Provincial Insolvency Act, III of 1907, section 30—acquisition by debtor of insolvent firm of hundis drawn by the latter—claim of set off on mutual dealings.

In September 1906 the defendant firm was indebted to the firms of S. N. P. L. and H. D. B. D. in a sum of over Rs. 4,000.

In the same month the two firms (which were in reality one, trading under separate names) became financially embarrassed and on 18th November 1906 they executed a deed by which the whole of their property was transferred to 10 persons as trustees for the creditors of the firms. Insolvency proceedings thereafter took place both at Amritsar and at Bombay and on 31st May 1907 the firms were declared insolvent by the High Court of Bombay. On 2nd January 1911 the outstandings of the insolvent firms were sold by public auction and purchased by the plaintiff, who now sued the defendant firm for recovery of the sum due by them to the insolvent firms.

The defendant firm alleged that they had on the 16th November 1906 purchased 3 *hundis* of the total value of Rs. 5,300 drawn by one of the insolvent firms in favour of the firm of N. C. M. M. and they now claimed to set off the amount of the *hundis* against the plaintiff's claims under section 30 of the Provincial Insolvency Act, 1907.

The Chief Court found on the facts that the transaction between the defendant firm and the firm of N. C. M. M. was entered into with the full knowledge that the drawer of the *hundis* at that time had become hopelessly involved and that the transfer was practically a bogus one, the object being to enable the defendants to set off the money due on the *hundis* against their own debts.

Held on these facts and following the principles laid down in 3 *Revised Reports* at p. 119 (1), and in 25 *Ch. D.* 587 (2), that there were no such mutual dealings between the insolvent firm and the defendants as to enable the latter to rely on the provisions of either section 39 of the Indian Insolvency Act (which had not been repealed at the time) or section 30 of the Provisional Insolvency Act.

31 *Revised Reports* 572 (3), referred to.

(1) (1794) 3 *Revised Reports* 119 (*Dickson v. Evans*).

(2) (1881) *L. R.* 25 *Ch. D.* 587 (*In re Milan Tramways Coy.*).

(3) (1839) 34 *Revised Reports* 572 (*Collins v. Jones*).

First appeal from the decree of Lala Achhru Ram, Aggarwal, Subordinate Judge, Amritsar, dated the 29th day of June 1912.

Shadi Lal and Santanam, for appellant.

Morton, Sheo Narain, Brij Lal and Todar Mal, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—The defendants, Ganga Ram Radha Kishen, 10th Feby. 1914.
a firm carrying on business at Amritsar, were indebted in September 1906 to the firm of Shiv Nath Rai Panna Lal and Harkishen Das Bhagwan Das. In the same month the latter firms (which were really one firm trading under separate names) became financially embarrassed and on the 18th of November executed and registered a deed whereby the whole of their property was transferred to 10 persons as trustees for the creditors of the firm. Insolvency proceedings thereafter took place in the Court at Amritsar and also in the Courts at Bombay and on the 31st of May 1907 the firms in question were declared insolvent by order of the High Court of Bombay and the property vested in the official assignee. Disputes arose between the official assignee so appointed and the official receiver appointed by the Amritsar Court and the case eventually came before their Lordships of the Privy Council who decided in favour of the official assignee (see No. 45 P. R. 1910) (1).

On the 2nd of January 1911 the outstandings due to the insolvent firms were sold by public auction by the official assignee and were purchased by plaintiff for Rs. 70,000.

Plaintiff instituted the present suit on the 30th of May 1911 and claimed to recover (1) Rs. 4,544-12-9, principal and interest, on account of the debt due from defendants to the firm of Shiv Nath Rai Panna Lal, and (2) Rs. 2,780-6-3, principal and interest, on account of the debt due from defendants to the firm of Harkishen Das Bhagwan Das. The defendants raised various pleas contesting plaintiff's right to recover and on the merits urged that the amount due from them to the firm of Shiv Nath Rai Panna Lal was Rs. 2,926-13-0 and not the sum claimed by plaintiff. They further urged that a sum of Rs. 286-3-0 was due to them on account of brokerage, that they were not liable to pay interest, and that they held three *hundis* of the total value of Rs. 5,300 drawn by Shiv Nath Rai Panna Lal in favour of a firm called Nanak Chand Malawa Mal but purchased by defendants on Maggar Badi 15th, Sambat 1963, equal to 16th November 1906. This sum the defendants

(1) 45 P. R. 1910 (P. C.) (*Official Assignee, Bombay, v. Registrar, Small Cause Court, Amritsar*).

claimed to be entitled under the provisions of the Indian Insolvency Act, section 39, to set off against the claim of the plaintiff.

As a matter of fact after issues had been framed and the books of the defendants examined by the plaintiff the latter agreed to accept the allegations of the defendants as to the actual amounts due from them to the insolvent firm of Shiv Nath Rai Panna Lal and the parties further agreed that the sum of Rs 200 should be taken as representing the commission due to defendants for brokerage. The two points remaining in dispute between the parties were therefore (1) whether the defendants were entitled to set off against the claim of the plaintiff the sum of Rs. 5,300 due on the *hundis* above referred to, and (2) whether the defendants were liable to pay interest and if so at what rate. The District Judge held that the defendants were liable to pay interest to plaintiff at the rate of Rs. 0-7-6 *per cent. per mensem*, but he dismissed the suit on the ground that the set-off claimed by the defendants was permissible under either section 30 of Act III of 1907 or under section 39 of the Indian Insolvency Act, inasmuch as there were mutual dealings between the insolvent and the defendants.

Plaintiffs have appealed to this Court and we have heard the case argued at considerable length on their behalf by Mr. Shadi Lal and by Messrs. Morton and Sheo Narain on behalf of the respondents. Practically the sole question before us is whether the set-off claimed by the defendants was rightly allowed.

Section 39 of the Indian Insolvency Act runs as follows :—

“ And be it enacted, that when there has been mutual “ credit given to the insolvent and any other person or persons, “ one debt or demand may be set against the other.”

Section 30 of the Provincial Insolvency Act, 1907, is expressed in rather fuller terms but is practically to the same effect. As a general rule the debt, credit or dealing which is set-off and the debt, credit or dealing against which it is set-off must be between the same parties and in the same right; but it has been held that the acceptor of a negotiable instrument gives credit to the drawer of that instrument and that every holder of it also gives credit within the meaning of this provision of law to the drawer (*Collins v. Jones* 34 *Revised Reports*, page 572) (1). This right is in England subject to the proviso that a person shall not be entitled to claim the benefit of set-off against the property of a debtor in any case where he had, at the time of giving credit to him, notice of available act of bankruptcy committed by the debtor.

(1) (1830) 34 *Revised Reports* 572 (*Collins v. Jones*).

Neither the Indian Insolvency Act, section 39, nor section 30 of the Provincial Insolvency Act make mention of the effect of notice of bankruptcy upon the right of person claiming to set-off, and the contention before us has been that in this country it is open to a person who owes money to an insolvent to obtain the right of set-off by giving *crédit* to him (e. g., by buying an acceptance of his or a note drawn by him) even after he has had full notice of the bankruptcy of the latter or of any act of bankruptcy committed by him. It is conceded, however, that this right probably does not exist once the insolvent's property has vested in the official assignee or in the official receiver as the case may be.

We have given this difficult question our most careful consideration but we are unable to accept the contention that this right of set-off is as unlimited and as absolute as Mr Sheo Narain argues. It is a doctrine of equitable jurisdiction, and "its object is not merely to avoid cross actions but to do substantial justice and to prevent the great injustice which would arise if a person who is the insolvent's creditor on one account and his debtor on the other is compelled to pay 16 annas in the rupee on what he owed to the insolvent and to receive less than that amount on what the insolvent owed him," (Chaviar's "Law of Insolvency and Bankruptcy," part 2, page 91).

We cannot believe that this principle can be extended to cover cases where at the time of insolvency one person owes a debt to the insolvent and with full knowledge that the latter has become hopelessly involved buys up a third person's claim against the insolvent in order to relieve himself of the liability of having to pay his just debt. In the present case we have no doubt that the transaction which took place between the defendants and the firm of Nanak Chand Malawa Mal was practically a bogus one. The three *hundis* were drawn in favour of the firm of Nanak Chand Malawa Mal on *Asauj Sudi* 7th, *Sambat* 1963 (24th September 1906) and were respectively for the sums of Rs. 1,600, Rs. 2,500 and Rs. 1,200. They were payable 60 days after date, i.e., on the 23rd November 1906.

Defendants, according to the evidence of Radha Kishen (P. W. 10), the principal defendant, were doing business with the insolvent firms up to the 14th November 1906 (*Maghar badi* 13th, *Sambat* 1963) and the witness admits that the shop of Shiv Nath Rai Panna Lal is only at a distance of 15 shops from the shop of his own firm and of 4 shops from his own house. That the drawers of the *hundi* were in financial straits about this very time (i.e., the 14th November 1906) is obvious

from the fact that on the 18th November 1906 they executed the deed assigning all their property to ten trustees, and in the ordinary course of things their embarrassed position must have been evident to all and sundry, some days before they were in a position to make this transfer to trustees who would naturally have to be consulted before such transfer could be effected.

In their written statement (page 66 of the paper-book, para. 6) defendants admit that "the business of the insolvent was completely closed on *Maghar Sudi 1st, Sambit 1963*" (i.e., the 17th November 1906). We cannot believe that the defendants who carried on business in the immediate neighbourhood and had dealings with the insolvents, were profoundly ignorant of what was going on and knew nothing about the condition of affairs in the insolvents' firms.

But, according to Nanak Chand (P. W. 23) the head of the firm of Nanak Chand Malawa Mal, defendants, were in need of money on the 16th November 1906, and apparently asked him for a loan of Rs. 10,000. He had, he says, come over that day from Jullundur to Amritsar in order to realise certain debts, and though these particular *hundis* were not then payable, had brought them with him, and as he could not give the defendants more than Rs. 5,000 in cash, he made up the deficiency by selling them the three *hundis* in question. Defendants "who stood in need of money" bought the three *hundis* at their full face value, though they were not payable until the 23rd November and though, as we have said, it must have been obvious to any one in the market that the drawers were at the time hopelessly bankrupt. We must assume that defendants are ordinary men of business and fully alive to all that is going on round them, and in the circumstances we find it impossible to believe that they and Nanak Chand entered into this transaction in the honest belief that the drawers of the *hundis* were in a position to meet their liabilities thereon on the 23rd November. And in this connection it is important to remember (1) that Nanak Chand is the uncle of Ganga Ram, one of the partners in the defendant's firm, and (2) that by a curious coincidence he had, on the 16th November, brought with him from Jullundur to Amritsar *hundis* which he well knew were not payable till the 23rd November.

But this is not all. Defendants are in need of money and have (as they allege) honestly bought *hundis* for their full value, believing that they would be duly met on the 23rd November. They discover in a day or two that the drawers are insolvent and have committed an act of bankruptcy by assign-

ing all their assets to trustees. Now, if the transaction between them and Nanak Chand had been, on their part at all events, honest and innocent, what course would they have adopted? Obviously, they would have insisted on returning the *hundis* to Nanak Chand. That such is the ordinary course of business is evident from the evidence of Mr. Cook (P. W. 12), Tirath Ram (D. W. 2) (page 94 of paper-book), *Sheikh* Ghulam Sadiq (P. W. 11, page 101), Bali Mal (P. W. 75, page 105) and Chhota Mal (P. W. 16, page 106). But so far from acting in this reasonable manner, defendants ask us to believe that though they subsequently found that they could not get payment of the *hundis* from the insolvent drawers, they nevertheless paid the full amount due thereon to Nanak Chand, who had sold the *hundis* to them at a time when the drawers were on the eve of finally closing business, (see Radha Kishen's evidence, page 89, line 30). And yet the last named witness admits that he would not have bought the *hundis* had he known that the drawers were insolvent. But having bought them, he apparently preferred to take his chance of setting these *hundis* up as a set-off against his own debt in preference to insisting upon Nanak Chand taking them back; he pays their full value to the latter and cheerfully runs the risk of inevitable litigation by electing to hold them as a set-off against his own debt.

The conduct of defendants as above set forth is sufficiently surprising but there are other facts which also excite comment. Admittedly defendants and Nanak Chand were duly notified by the Official Assignee of the insolvency of the drawers of the *hundis*. Unfortunately neither defendants nor Nanak Chand are able to produce these notices, but they admit that they received them. And yet neither of them informed the Official Assignee, until about August 1911 (see exhibit P. 14, page 11) that the *hundis* in question had been assigned to defendants. No doubt defendants were not bound to give this information, but in view of the fact that if they were *bonâ fide* holders of the *hundis*, the insolvents' estate would have been indebted to them and not they to the said estate, it is somewhat curious that they did not take the trouble to notify the Official Assignee that so far from their being indebted to the estate, the estate was in fact indebted to them.

Such are the peculiar circumstances of the alleged sale of the *hundis* and we find it impossible to believe that the transaction between Nanak Chand and the defendants was a genuine transfer for consideration. It appears to us that on the 16th November Nanak Chand realized that his securities would be

(comparatively speaking) of little value when they matured on the 23rd of that month. On the other hand, these securities, if in the possession of defendants as holders, would, it was thought, be of very considerable value inasmuch as it was hoped by their means to relieve defendants of the necessity of paying up over Rs. 4,000 which defendants owed to the insolvent firms. It is not surprising therefore to find that Nanak Chand, the uncle of one of the defendants, was ready to transfer the *hundis* to the defendants' firm, both he and the latter no doubt trusting that the assignment would effect its object and enable the defendants to set-off the Rs. 5,300, due on the *hundis* against their own debt.

We cannot regard a transaction of that kind as being within the spirit of section 39 of the Indian Insolvency Act or of section 30 of the Provincial Insolvency Act; nor can we accept the contention that the defendants when taking the *hundis* gave credit to the drawers whom they knew at the time to be on the verge of bankruptcy. In this connection we would refer to the case of (*Dickson v. Evans* 3, Revised Reports, page 119) (1). In that case Lord Kenyon made the following remarks :—

“ The words of the Stat. 5, Geo. II, C. 30, s. 23, are expressed, that if it shall appear to the Commissioners that there has been mutual credit given by the bankrupt, or mutual debts between the bankrupt and any other person at any time before the bankruptcy, the Commissioners shall state the account, &c, and what shall appear to be due, &c., shall be claimed or paid. That Act was founded on good sense; and it provides that the assignees shall not recover against a debtor of the bankrupt what was due to the bankrupt on one side of the account, without also taking into consideration the other side of the account, and seeing on which side the balance lies. That is the justice of the case. But it would be most unjust indeed if one person, who happens to be indebted to another at the time of the bankruptcy of the latter, were permitted by any intrigue between himself and a third person so to change his own situation as to diminish or totally destroy the debt due to the bankrupt by an act *ex post facto*. In cases of this sort the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change of situation of one of the parties.”

In the same case Grose, J., remarked as follows:—

“The Stat. 5, Geo. II, C. 30, seems peculiarly adapted to this case; one object of the Act was to prevent a debtor of the bankrupt going about the country for the purpose of purchasing the bankrupt's notes after the bankruptcy, and then pretending that he was a creditor at the time of the bankruptcy.”

In a more recent case (*In re Milan Tramways Company, L. R. 25 Ch. D. 587*) (1), Lord Selborne, while admitting that the right to a debt proved in bankruptcy might be assigned, added:—

“This may be law; but if so, it is only matter of positive law not resting on any principle of justice, and we have now to decide whether it is law, it is urged that by the Judicature Act of 1878 the rules in bankruptcy are made applicable to companies in liquidation. The 10th clause of the Judicature Act, 1875, refers only to a company unable to pay its debts, but I am of opinion that it must be treated as applicable to any company in liquidation until it is shown that the assets are sufficient for payment of the debts in full. Now under section 39, of the Bankruptcy Act, 1869, the line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions.

* * * * *

“Suppose after the proof is made it is assigned to some one who is indebted to the company, can that person set off the debt proved against the claim which the company has against him? In my opinion clearly not. It is impossible that a person, who at the time of the bankruptcy owes a debt to the bankrupt and has no right of set-off, can acquire such a right by taking an assignment of another debt due to another creditor of the bankrupt.”

As a result of our findings and in reliance upon the authorities cited we hold that there was in the present case no such mutual dealings between the insolvent firm and the defendants as to enable the latter to rely on the provisions of either section 39 of the Indian Insolvency Act or section 30 of the Provincial Insolvency Act. We accordingly accept the appeal and grant plaintiff a decree for Rs. 4,924-13-3 with interest at the rate of Re. 0-7-6 *per cent. per mensem* up to the date of suit and thereafter at the rate of Rs. 6 *per cent. per annum* up to date of realization, defendants will pay costs throughout.

Appeal accepted.

(1) (1884) *L. R. 2 Ch. D. 587* (*In re Milan Tramways Coy.*).

No. 54.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Shah Din.

JAMAL AND OTHERS—(PLAINTIFFS)—APPELLANTS

Versus

QADIR BAKHSI AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 423 of 1912.

Suit: Valuation Act, VII of 1887, sections 3, 4 and rule VI—valuation of suit for declaration by occupancy tenants against their landlords that the latter are not entitled to recover from them more than $\frac{1}{8}$ th share of produce.

Held, that a suit for a declaration brought by plaintiffs, as occupancy tenants, against defendants, as their landlords, to the effect that the latter are not entitled to recover from them by way of rent more than $\frac{1}{8}$ th share of produce, known as *lichh*, is covered by section 4 of the Suits Valuation Act, read with the rules framed under section 3 and that the value of the suit for purposes of jurisdiction is accordingly 15 times the land revenue.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Multan Division, dated the 23rd January 1912.

Badr ud-Din, for appellants.

Fazal-i-Elahi, for respondents.

• The judgment of the Court was delivered by—

20th Feb. 1914.

SHAH DIN, J.—The plaintiffs, who are occupancy tenants of certain land attached to Gulmadarwala well, situate in *mauza* Bir Band, *tahsil* Alipur, have sued the defendants, who are landlords of that land, for a declaration that the latter are not entitled to recover from them by way of rent more than $\frac{1}{8}$ th share of produce, known as *lichh*. The suit was valued for purposes of jurisdiction at 30 times the revenue of the land, amounting to Rs. 1,171-14-0, and both the Courts below have concurred in dismissing the suit.

The plaintiffs have preferred a further appeal to this Court, and on behalf of the respondents Mr. Fazl Ilahi has raised a preliminary objection that the suit has been over valued at Rs. 1,171-14-0, the proper value being $\frac{1}{2}$ of that amount and that, therefore, no further appeal lay to this Court under section 40 (1) (b) (ii) of the Punjab Courts Act as it stood before it was amended by Act 1 of 1912. In support of his contention that the value of the suit is 15 times the land revenue, and not 30 times, counsel relies upon rule VI of the rules framed by the Local Government under section 3 (1), read with section 4 of the Suits Valuation Act, VII of 1887.

Mr. Badr-ud-Din for the appellants has argued that the provisions of the rule, relied upon by the respondents' counsel, do not apply to a suit of this kind, which does not relate to an occupancy right, but in which the plaintiffs seek a declaration that the defendants are not entitled to receive from them by way of rent more than $\frac{1}{8}$ th share of the produce. He has urged that this suit is not covered by any of the rules framed under section 3 of the Suits Valuation Act or by section 4 thereof and, according to him, the value of the suit is the total value of the garden, houses and *banjar* land of which his clients are in possession as occupancy tenants.

We think that Mr. Badr-ud-Din's contentions have no force whatever, and that the present suit which is one for a declaration and relates to occupancy land or interest in occupancy land is clearly covered by section 4 of the Suits Valuation Act, which must be read with the rules framed under the provisions of section 3 to determine the value of the suit for purposes of jurisdiction. Under the provisions of the aforesaid sections and rules the jurisdictional value of the present suit is clearly 15 times the land revenue which is less than Rs. 1,000 and since both the Courts below have concurred in dismissing the suit no further appeal lies to this Court. The appeal is accordingly dismissed with costs.

Appeal dismissed.

No. 55.

Before Hon. Mr. Justice Johnstone and Hon. Mr.

Justice Shah Din.

MILKHI AND OTHERS—(PLAINTIFFS)—APPELLANTS

Versus

RAM DAS AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1321 of 1911.

Custom—succession—by adopted son in his natural family—Bains Jats, tahsil Garhshankar, District Hoshiarpur—Riwaj-i-am—value of entry in.

Held, that it had been proved in this case that among Bains Jats, tahsil Garhshankar, District Hoshiarpur, a man "adopted" into another family by customary appointment as heir loses all right to succeed to the estate of an ancestor in his natural family, if other descendants of that ancestor also exist.

68 P. R. 1898 (1) and Civil Appeal 865 of 1903 (unpublished), referred to.

Held also, that an entry in a *Riwaj-i-am* in which the custom of one part of a district is carefully differentiated from that of the rest of the district, as in this case, deserves attention and has some weight.

Held further, that the plaintiffs contesting the adopted son's right to succeed in his natural family, were not prejudiced by the decision of the Chief Court in Civil Appeal No. 1415 of 1896, in a suit to which they were not parties, holding that the adopted son could not succeed collaterally in his adoptive father's family.

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge of the Ludhiana Division, dated the 14th day of June 1911.

Duni Chand, for appellants.

Nand Lal, for respondents.

The judgment of the Court was delivered by—

25th Feb 1914.

JOHNSTONE, J.—Dewa, defendant-respondent, having died, a Judge in Chambers granted the application of the appellants that the names of Hulasa and Ram Das, his sons, should be substituted for his, making the order as usual subject to all just exceptions. Mr. Nand Lal objects that the application was too late. It stated that Dewa had died four months previously; and, though Mr. Nand Lal says he is instructed that Dewa died three years ago, in Phagan Sambat 1967, he admits he has no evidence to offer on the point and has not supported his instructions by affidavit. Now Hulasa has died. He and Ram Das were both minors when impleaded and Hulasa's heir is Ram Das. In these circumstances we simply direct that Ram Das, who is already on the record, be considered Hulasa's representative and we overrule Mr. Nand Lal's objections.

The sole question in this case, which was admitted under section 70 (1) (b), Punjab Courts Act, as it stood before its amendment by Punjab Act, I of 1912, is whether among the Bains Jats of *tahsil* Garhshankar, District Hoshiarpur, a man who has been "adopted," under custom, into another family, retains his right of succession to property in his natural family or not.

The first Court answered this question in the affirmative, laying the *onus* on plaintiffs, the heirs, who wished to exclude defendant 1, Dewa, the adoptee in question, and so dismissed the suit, which was for a declaration that defendant Dewa was not entitled to participate in the estate left by Jawahir, deceased, ancestor of plaintiffs and Dewa.

The learned Divisional Judge, Mr. Ellis, thought, and with some reason, that the First Court had dealt rather summarily with a rather important question, and so made a remand for further enquiry. Lala Ram Chand, Local

Commissioner, made a careful enquiry and wrote a good report. After examining many witnesses and carefully weighing the evidence and the instances forthcoming on the one side and the other, Lala Ram Chand expressed the opinion that among these people a man "adopted" into another family by customary appointment as heir loses all right to inheritance in his natural family.

This report was duly forwarded, with approval, to the lower Appellate Court, which seems to have been impressed by it and to have been inclined to agree in it, but which deemed itself bound by a judgment of the Chief Court in Civil Appeal 865 of 1903, decided on 12th December 1906. We have seen that judgment. In it it was noted that, on the principle laid down in 68 P. R. 1898 (1), the general rule was that appointment under custom as an heir did not deprive the appointed one of his ordinary rights of succession in his natural family, and that on the record there was no sufficient evidence to rebut this presumption. The case was one of Hoshiarpur District.

Mr. Duni Chand, for appellants, however, urges that this ruling does not necessarily conclude the matter; that it is open to his clients to try to prove that among the Bains Jats of *tahsil* Garhshankar the rule is the reverse of this; and that they have succeeded in rebutting any presumption there may be arising out of the rulings of this Court on the general question and out of the specific ruling in Civil Appeal 865 of 1903 just noticed.

We find ourselves unable to resist these propositions. The judgment under consideration proceeded upon the absence *in that case* of sufficient evidence to rebut a rebuttable presumption; and such a judgment cannot prevent another person, no party to it, from striving to obtain a contrary verdict. And, after carefully examining all the *data* on the record, we think that the custom among this tribe of Jats of *tahsil* Garhshankar is against succession by an adopted son in his natural family. The learned Divisional Judge's analysis of the instances given on both sides is fair and judicious, and it brings out results very much in favour of the plaintiffs. To it we have to add the entry in the *Riwaj-i-am* in connection with this matter: for *tahsil* Garhshankar it is expressly noted that the adopted son does not inherit in his natural family from his father, even if he was an only son, while for the rest of the district this holds

(1) 63 P. R. 1893 (*Rukin Din v. Mussammat Mariam*).

good only if the adopted son left behind him a brother or brothers in his natural family, the rule being that, if he did not and was an only son, he would succeed in preference to mere collaterals. Now it is true, as laid down in many rulings, that an entry of custom in a *Rivaj-i-am* has not the same evidential value as an entry in a village *Wajib-ul-arz* and is of little or no value unless supported by instances; but circumstances alter cases and we think that a record of custom like this, in which the custom of one part of a district is carefully differentiated from that of the rest of the district, deserves some attention and has some weight. Nor do we think that, because Dewa aforesaid was, in Civil Appeal 1415 of 1896 of this Court, refused collateral succession in his adoptive family, plaintiffs, in their present contest with him and his descendants, are affected adversely. Plaintiffs were no parties to that suit, and it would be unfair to hold them prejudiced by it.

Common sense and the *Rivaj-i-am* entry aforesaid shew that there is more to be said for the claim of a man "adopted" into another family to inherit in his natural family when he was an only son or descendant of the last male owner than when he was not the only son or descendant. Here Dewa was no doubt the son of Dittu, and plaintiffs are Dittu's collaterals, but this must not blind us to the fact that Dittu pre-deceased his father Jawahir, the common ancestor of the plaintiffs and Dewa, and that the property in suit is the estate of Jawahir, and not of Dittu. This case, therefore, is really not one of a contest between an only son and collaterals, but between a grandson and other descendants of the last male owner. In these circumstances the evidence on the record seems to us very strongly in favour of the plaintiffs.

We hold that in this *Bains* tribe of *tahsil* Garhshankar a man, being a male lineal descendant of the last male owner, and having been appointed heir under customary rules to a man of another family, does not inherit along with other descendants of that male owner.

Plaintiffs also relied upon a will of Jawahir, which it is said disinherited Dittu and Dewa; but on the above finding we need not go into this.

Appeal accepted and plaintiffs' suit decreed, with costs throughout.

Appeal accepted.

No. 56.

Before Hon. Sir Alfred Kensington, Kt., Chief Judge.

NAWAB KHAN—DEFENDANT

Versus

KARAM CHAND—PLAINTIFF.

Civil Reference No. 2 of 1914.

Punjab Tenancy Act, XVI of 1887, section 100 (2)—registration of decree of a Revenue Court as one of a Civil Court—prejudice to parties.

The plaintiff sued in the Revenue Court to recover Rs. 160 as damages for 2 years under an agreement, by which the defendants undertook to give up cultivation of certain land to plaintiffs or in default to pay Rs. 80 a year. The Assistant Collector dismissed the suit holding that the matter was one for a Civil Court to decide.

The Collector on appeal decreed the claim. The Commissioner, holding that the Revenue Courts had no jurisdiction, referred the case to the Chief Court to have the decree of the Collector registered as that of a Civil Court.

Held, that the suit, if heard by the Civil Courts, would be a Small Cause under Rs. 500 in value and no second appeal would be competent, so that the effect of registering the decree of the Collector would be to prejudice the defendants by depriving them of all further remedy and the Chief Court could not, therefore, intervene under section 100 (2) of the Tenancy Act.

Case referred by H. Maynard, Esquire, Commissioner, Rawalpindi Division, for the orders of the Chief Court.

Nemo, for petitioners.

Nemo, for defendant.

The order of the learned Chief Judge was as follows :—

SIR ALFRED KENSINGTON, C. J.—This is understood to be 26th Feb. 1914.
a reference by the Commissioner of Rawalpindi under section 100, Punjab Tenancy Act, though this is not precisely stated in the order of reference. The Chief Court is asked to register the appellate decree of the Collector, dated the 9th April 1913, as the decree of a Civil Court. By that decree plaintiff has been allowed in full the sum of Rs. 160 claimed.

I find it difficult to follow the argument of the learned Commissioner. As at present advised I am of opinion that

the parties to the suit in question stand in the relation of landlord and tenant, and that the suit is covered by clause (i) of section 77 (3) of the Tenancy Act, and has therefore been properly heard in the Revenue Courts. The facts are however of an unusual nature and I do not wish to express too positive a view on the point.

But, even if it be assumed that the Commissioner is right on that point, I cannot agree with him that the parties would not be prejudiced by the course which he suggests. The suit, if heard by the Civil Courts, would be a Small Cause under Rs. 500 in value, and under section 41 (2), Punjab Courts Act as amended in 1912 no second appeal will lie. The effect of registering the Collector's decree would therefore be to deprive the defendants of all further remedy, as it can hardly be said that such material irregularity is disclosed as to justify interference by revision under section 70. This result can scarcely have been contemplated by the Commissioner who has himself indicated doubt as to the correctness of the Collector's decision on the merits.

Clause (2) of section 100, Tenancy Act, gives the Chief Court power to act only where it appears that the parties have not been prejudiced by a mistake as to jurisdiction. If they have been prejudiced registration is inadmissible.

The reply to the reference must therefore be that the Chief Court cannot intervene. The records will be returned to the Commissioner for disposal of the appeal before him in whatever manner he may consider proper.

If notwithstanding what has been said above he should still on further consideration hold that the Revenue Courts have no jurisdiction, it may be open to him to set aside the decrees of both the Lower Revenue Courts and to return the plaint for presentation in the Civil Court having jurisdiction.

Reference rejected.

No. 57.

*Before Hon. Sir Alfred Kensington, Kt., Chief Judge,
and Hon. Mr. Justice Beadon.*

BULANDA AND NAWAB—(PLAINTIFFS)—APPELLANTS

Versus

FATEH DIN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 371 of 1909.

*Mortgage—Conditional sale—Regulation XVII of 1806—invalid proceed-
ings for foreclosure—interest allowable on such a mortgage.*

Plaintiffs sued to redeem certain land mortgaged by a collateral of their's to the defendants in 1883. Under the terms of the mortgage deed defendants got possession and very onerous stipulations were laid down as to interest, with a further condition that if the mortgage money was not repaid within 3 years the land should be considered as sold to the defendants. In 1887 the mortgagees took proceedings under Regulation XVII of 1806.

Held that the proceedings under Regulation XVII of 1806, were invalid (a) as no attempt was made to proceed against all of the heirs of the mortgagor.

51 P. R. 1892 (1), referred to.

(b) as the notice proceedings made no reference to section 7 of Regulation XVII of 1806.

24 P. R. 1895 (2), 21 P. R. 1903 (3) and 28 P. R. 1908 (4), referred to.

(c) as the notice proceedings did not specify the amount to be paid to the mortgagor within the year of grace.

84 P. R. 1882 (5), referred to.

Held also, that no interest should be allowed to the mortgagees except for the 3 years after which the land was to be considered as sold, there being no independent covenant as to interest after that period.

92 P. R. 1908 (6), referred to.

Held further that under the circumstances of the case *post dictum* damages, being discretionary with the Court, must be refused.

73 P. R. 1892 (7), and 95 P. R. 1902 (8), referred to.

Further appeal from the decree of W. De M. Malan, Esquire, Additional Divisional Judge at Sialkot, dated the 7th January 1909.

Rambhaj Datta, for appellants.

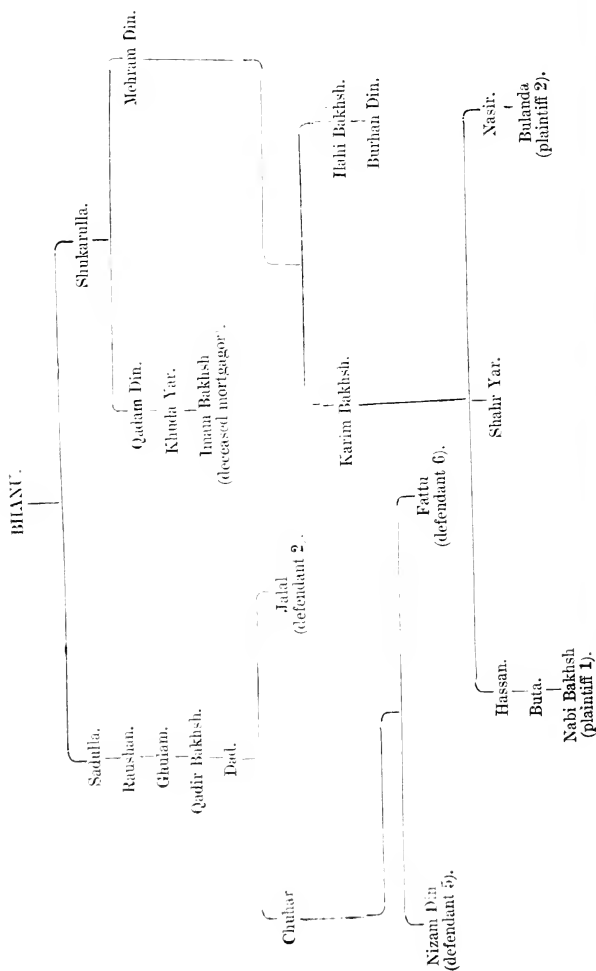
Balwant Rai, for respondents.

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- (1) 51 P. R. 1892 (*Maya Shah v. Feroz Din*).
 (2) 24 P. R. 1895 (*Wasawa Singh v. Rura*).
 (3) 21 P. R. 1903 (*Ram Chand v. Sandal Khan*).
 (4) 28 P. R. 1908 (*Balwant Singh v. Ram Das*).
 (5) 84 P. R. 1882 (*Mehro v. Suja*).
 (6) 92 P. R. 1908 (*Ghulam Haidar v. Phaphal*).
 (7) 73 P. R. 1892 (*Sheo Chand v. Chunna*).
 (8) 95 P. R. 1902 (*Jawalir Mal v. Raja Shah*).

The judgment of the Court was delivered by—

7th March 1914.

SIR ALFRED KENSINGTON, C. J.—The following contains so much of the pedigree-table as is material :—



On the 28th May 1883 Imam Bakhsh mortgaged the 591 *kanals* in suit with *shamilat*, with possession, for Rs. 600 to (1) Bulaki, now defendant 1, (2) Jalal, now defendant 2, and (3) Jiwan Shah, Arora, father of defendants 3 and 4, who have transferred their rights to Nizam Din and Fattu, defendants 5 and 6. It will be observed from the pedigree-table that defendants 2, 5 and 6 are somewhat more remote collaterals of Imam Bakhsh than the plaintiffs, so that the latter are his immediate reversioners.

The terms of the mortgage were onerous, considering the large area mortgaged, of which over two-thirds is cultivated and assessed at about Rs. 36. Possession passed at once of the entire holding, of which the profits are presumably not less than Rs. 100 a year, but the profits were to be set off against interest on Rs. 200 only, the remaining Rs. 400 mortgage money bearing interest at Rs. 18 per cent. or Rs. 72 a year. There was also a conditional sale clause.

The plaintiffs claimed redemption at Rs. 300 and were given a decree by the Subordinate Judge at Rs. 816, made up of Rs. 600 principal and Rs. 216 interest for three years. The plaintiffs accepted this decree, but on an appeal by the defendants the lower appellate Court found that the conditional sale clause had taken effect under valid notice proceedings of 1887, and thereon dismissed plaintiffs' suit.

The notice proceedings were not carefully examined by the learned Divisional Judge, and we cannot agree with him that they were in order. On the contrary they were patently defective and this, no doubt, explains why the mortgagees did not follow them up with a foreclosure suit.

Imam Bakhsh died in 1884, and his heirs, Buta, Shahr Yar, Nasir and Burhan Din (see pedigree), at once claimed possession of the land on the ground that the mortgage was fictitious. Their suit was dismissed on the 30th July 1884, but they had asserted their title as heirs in the plainest possible way and only failed because the mortgage was pronounced valid.

In the notice proceedings of 1887 no attempt was made to proceed against any of the heirs of Imam Bakhsh, except Buta and Shahr Yar, though, as admitted by defendants' pleader, Nasir and Burhan Din did not die till many years later. This defect alone is vital (51 *P. R.* 1892) (1), but further the notice

(1) 51 *P. R.* 1892 (*Maya Shah v. Feroz Din*).

proceedings made no reference to section 7 of Regulation XVII of 1806 (24 P. R. 1895 (1), 21 P. R. 1903 (2) and 28 P. R. 1908) (3), and did not specify the amount to be paid by the mortgagor within the year of grace (84 P. R. 1882) (4).

There were other minor defects also, but we need not specify them as it is clear that defendants did not rely on the 1887 proceedings in the first Court. They referred to them in para. 6 of their written statement, but in para. 7 they laid no stress on the point, and there was consequently no issue about the validity of the notice. Finally, on the 26th June 1907, the very day on which the Subordinate Judge delivered judgment, all the defendants concerned jointly said in explicit terms that they surrendered any plea of absolute title by virtue of the conditional sale clause.

In the face of all this we must hold that the lower appellate Court was wrong in allowing the question to be raised in appeal, as well as in finding that such defective notices should be acted on over 20 years afterwards. The defendants have established no title as owners and can only fall back on their position as mortgagees.

There is then no dispute about anything except the amount to be now fixed as redemption money. The defendants demanded Rs. 1,728 as interest, but we think that the Subordinate Judge was clearly right in allowing only Rs. 216 in addition to the principal of Rs. 600. The mortgage deed was clearly drawn and specified that the land should be taken over as sold outright on failure of the mortgagor to pay the principal with interest for three years. The defendants themselves understood this, as shewn by their ineffectual notice proceedings in 1887. They were in possession and could not in terms of the deed pile up an interest demand against the mortgagor for more than three years, there being no independent covenant as to interest to justify them under the ruling in 92 P. R. 1908 (5).

We are asked by defendants' pleader to at least allow further *post diem* damages at Rs. 72 a year for six years with reference to the rulings 73 P. R. 1892 (6) and (more particularly) 95 P. R. 1902 (7), but on the facts of the present case

(1) 24 P. R. 1895 (*Wasawa Singh v. Kura*).

(2) 21 P. R. 1903 (*Ram Chand v. Sandul Khan*).

(3) 28 P. R. 1908 (*Babwant Singh v. Ram Das*).

(4) 84 P. R. 1882 (*Mehro v. Suja*).

(5) 92 P. R. 1908 (*Ghulam Haider v. Phaphal*).

(6) 73 P. R. 1892 (*Sheo Chand v. Chumna*).

(7) 95 P. R. 1902 (*Jauahir Mal v. Raja Shah*).

we do not see our way to exercising discretion of the kind in defendants' favour. They have enjoyed the profits of a very large area for some 30 years in return for a comparatively small outlay. They are not in equity entitled to any larger sum than was contemplated by their deed, and by this their legal demand for interest is limited to Rs. 216. They could have foreclosed for that amount if they wished, but cannot benefit from their own negligence in the matter of notice under the conditional sale clause.

The appeal of the plaintiffs is accordingly accepted. The decree of the lower appellate Court is set aside, and in its place we restore the decree of the first Court in plaintiffs' favour for possession, by redemption, of the land in suit on payment of Rs. 816. Under rule 7 of Order XXXIV, Civil Procedure Code, the decree will specify that this sum of Rs. 816 must be paid into the first Court by the plaintiffs within six months from the date of the decree. The plaintiffs will, if they deposit the money within the period prescribed, recover their costs from the defendants 1, 2, 5 and 6 in the lower appellate Court and in this Court, the Subordinate Judge's order that the parties should bear their own costs in his Court being maintained.

Appeal accepted.

No. 58.

*Before Hon. Sir Alfred Kensington, Kt., Chief Judge,
and Hon. Mr. Justice Beadon.*

BHAGWAN DAS—(PLAINTIFF)—APPELLANT

Versus

MUSSAMMAT RAM BAI—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1033 of 1909.

Burden of proof—as to consideration for a sale effected by registered deed—where vendee has slept over his rights for a considerable time.

Plaintiff sued on 17th March 1908 for possession of land and house property as vendee under a sale deed executed and registered in September 1900, the alleged vendor died in 1904 and mutation was made in favour of his widow, the present defendant, without objection by the plaintiff.

Held, following 68 P. R. 1900 (1), that under the circumstances of the case the lower Courts were right in placing the *onus* of proving consideration for the sale on the plaintiff notwithstanding registration of the sale deed.

Further appeal from the decree of H. Scott-Smith, Esquire, Divisional Judge, Ferozepore Division, dated the 11th May 1909.

Shadi Lal, for appellant.

Muhammad Shafi, for respondent.

The judgment of the Court was delivered by—

7th March 1914.

SIR ALFRED KENSINGTON, C. J.—The lower Courts have here agreed in dismissing plaintiff's suit for possession of land and house property of which he claims to be the vendee under a sale-deed executed on the 26th and registered on the 28th September 1900. The suit was instituted on the 17th March 1908, as against the vendor's widow, both parties being *mahajans* by caste.

The alleged vendor died in or about 1904, and the defendant was apparently entered as owner of the land in his place without any attempt by plaintiff to contest the mutation order. There is no doubt a note by the *patwari* on the extract from the records filed with the plaint, to the effect that the plaintiff was still disputing defendant's title, but this note seems to be an unauthorized comment by the *patwari*, as it is dated 9th May 1907, and the defendant had been already entered as owner in the *jamabandi* for 1905-06.

The plaintiff's delay in suing both during the lifetime and after the death of the vendor, Amra, and his failure to even apply for mutation in reasonable time, lay his claim open to very strong suspicion. He has attempted to explain the delay by asserting that the vendor took a separate lease of the land from him at Rs. 205 a year, simultaneously with the sale. The deed of lease was unregistered and purported to be for one year only. It was produced by the plaintiff on the 17th November 1908, three days after both sides had closed their case. Nothing was said about it by plaintiff when examined on the 13th November neither the writer nor the attesting witness Sahi Ram were called to prove the deed, and Sahi Ram was not questioned about it when examined as plaintiff's witness on the 20th October. We must take it that the deed was not proved and could not be received in evidence, though even if this difficulty could be got over, it would still be of no assistance to plaintiff, as the lease was clearly never acted on.

Under these highly suspicious circumstances we think that the lower Courts were amply justified in following the ruling in 68 P. R. 1900 (1) and in placing the *onus* of proving con-

sideration for the sale on the plaintiff notwithstanding registration of the sale-deed. It is then unnecessary for us to discuss the grounds on which it has been held that consideration is not proved, as plaintiff's counsel felt obliged to admit that he could not, on the evidence produced, argue that the decision against plaintiff was wrong. He could only hope to succeed in his appeal if he could establish an error in respect of the burden of proof, and we think that he was well advised in taking this line as the evidence goes far to show that no money really passed.

We cannot attempt to explain Amra's execution of the deed where so much is rendered obscure by plaintiff's negligence to assert his title in good time, but it seems clear enough that the transaction was, for some reason or other, recognized by the parties at the time as not amounting to a valid sale, and this probably accounts for the refusal of the arbitrators to act after reference was made to them at an early stage in the proceedings.

However that may be, the appeal must fail on our finding that the *onus* was rightly placed on the plaintiff. It is dismissed with costs to the defendant.

Appeal dismissed.

No. 59.

*Before Hon. Mr. Justice Johnstone and Hon. Mr.
Justice Shah Din.*

JINDA RAM—(DEFENDANT)—APPELLANT

Versus

HUSAIN BAKHISH—(PLAINTIFF)—AND MUSSAMMAT
BAKHTIAR—(DEFENDANT)—RESPONDENTS.

Civil Appeal No. 543 of 1910.

Punjab Pre-emption Act, II of 1905, section 13 (1) severally—Urban immovable property—status of Mutawalli of a mosque and Manager of a dharmasala to claim pre-emption—Muhammadan law.

Held, that the Mutawalli of a Muhammadan mosque has a right of pre-emption, and can exercise that right, under section 13 (1) *severally* of the Punjab Pre-emption Act, II of 1905, in respect of urban immovable property which is adjacent to the mosque, and that for the purposes of the Pre-emption Act, no distinction can be made between the rights of the Mutawalli of a mosque and those of the Manager of a *dharmasala*.

153 P. R. 1884 (1), 100 P. R. 1885 (2), I. L. R. 26 All. 212 (3), referred to.

Civil Appeal No. 1525 of 1882 (unpublished), disapproved.

- (1) 153 P. R. 1884 (*Shankar Das v. Said Ahmad*).
- (2) 100 P. R. 1885 (*Shah Bodhraj v. Sundar Singh*).
- (3) (1903) I. L. R. 26 All. 212 (*Lekhraj v. Gurdut*).

Further appeal from the decree of Major B. O. Roe, Divisional Judge, Multan Division, dated the 12th February 1910.

Sheo Narain, for appellant.

Shah Nawaz, for respondents.

The judgment of the Court was delivered by—

10th March 1914

SHAH DIX, J.—The plaintiff-respondent, Khuda Bakhsh, is *mutawalli* of a mosque called the Bohar Darwazewali mosque in the town of Multan. He brought this suit for possession, by pre-emption, of two houses adjacent to the mosque which were sold by defendant No. 1 to defendant No. 2, who is now appellant before us, by a registered deed, dated the 10th January 1908. Both the Courts below have concurred in decreeing the claim, and the sole question for decision in this further appeal is whether or not the plaintiff, Khuda Bakhsh, as *mutawalli* of the mosque in question, was competent to claim pre-emption in respect of the property sold on behalf and for the benefit of the mosque.

The appellant's advocate has contended that under Muhammadan Law a *mutawalli* of a mosque is not competent to enforce the right of pre-emption in the name of the mosque and that since a mosque is not a juristic person, a suit like the present is not maintainable under the Punjab Pre-emption Act, 11 of 1905, which admittedly governs this case. The learned advocate has had to admit that two published decisions of this Court, *viz.* No. 153 P. R. 1884 (1), and No. 100 P. R. 1885 (2), are against him on this point; but he has urged that the first mentioned decision is unsound, and that the second decision, though it approves of No. 153 P. R. 1884 (1), does not deal directly with the point before us and is not, therefore, an authority in support of the plaintiff's position. As against the decisions cited, the appellant's advocate has relied on the unpublished ruling of this Court in Civil Appeal No. 1525 of 1882 and on the opinion of the learned author of the Digest of Customary Law in the last paragraph of Remark 2 under section 97 of that work. In support of his contention that the *mutawalli* of a mosque cannot exercise the right of pre-emption on behalf of the mosque, he has relied on Tyabji's Muhammadan Law (Edition of 1913) page 472, Illustration (3), and page 473, paragraph 542.

On the other hand, the respondent's counsel has placed his reliance upon the published decisions of this Court above referred to and also upon *I. L. R. XXVI All. 212* (3), *Ameer Ali's*

(1) 153 P. R. 1884 (*Shankar Das v. Said Ahmad*).

(2) 100 P. R. 1885 (*Shah Bodhraj v. Sundar Singh*).

(3) (1903) *I. L. R.* 26 All. 212 (*Lekhraj v. Gurdut*).

Muhammadan Law, Volume I (3rd edition, pages 368 and 587); and Abdur Rahim's Muhammadan Jurisprudence, page 218.

In the course of his argument the advocate for the appellant referred to Markby's Elements of Law (6th edition), pages 86—91, and to Lord Halsbury's Laws of England, Volume VIII, page 303, in connection with the definition of "Corporation," and contended that a mosque was not a corporation in the sense in which a church or even a Hindu temple may be.

We may at once say here that in a case like the present all reference to English Law on the subject of the legal essentials of "a Corporation" is wholly out of place, for all that we have to decide in this case is whether under the provisions of section 13 (1) of the Punjab Pre-emption Act (II of 1905) the plaintiff, in his capacity of *mutawalli* of a mosque, has or has not a right of pre-emption in respect of the houses adjacent to it.

Section 13 aforesaid on which the present suit is based runs as follows :—

"13 (1). The right of pre-emption in respect of urban
"immovable property shall vest—

* * * * *

"*Seventhly*, in a person whose immovable property is adjacent to such property."

The question for decision in this case, then, is whether the plaintiff, who is *mutawalli* of the Bohar Darwazewali mosque, is, "a person whose immovable property is adjacent to" the property sold. It is not disputed that the plaintiff in his capacity of *mutawalli* is the manager of the mosque precisely in the same way as the head of a Hindu temple or the *Mahant* of a *Sikh* shrine in this province is the manager of the religious institution concerned. Nor is it disputed that the manager of a *dharmsala* or temple can claim a right of pre-emption under the Punjab Pre-emption Act, the soundness of the decisions in No. 100 P. R. 1885 (1), and I. L. R. 26 All. page 212 (2), on this point being conceded, but it is argued that since a Muhammadan mosque is not a juristic person and cannot hold property as a Hindu *dharmsala* or temple can, no right of pre-emption can be exercised by the *mutawalli* of such a mosque.

The last part of this argument can be disposed of in a few words. As observed by Mr. Justice Abdur Rahim in his Muhammadan Jurisprudence at page 218,—“It may be doubted whether the earlier Muhammadan jurists would recognise an

(1) 109 P. R. 1885 (*Shah Bodhraj v. Sundar Singh*).

(2) (1903) I. L. R. 26 All. 212 (*Lekhraj v. Gurdatt*).

“artificial or juristic person * * * * * But later
 “jurists seem inclined to recognise an artificial person ; for
 “instance, they would allow a gift to be made directly to a
 “mosque, while the ancient doctors would require the interven-
 “tion of a trustee.”

In Mr. Tyabji's Muhammadan Law it is stated in paragraph 363 at page 275 that a gift may be made to a mosque or other institution. The learned author illustrates this proposition as follows:—

“A man gives money for the repairs of a *masjid* and
 “for its maintenance and for its benefit. This is valid ; for, if
 “it cannot operate as a *waqf*, it operates as a transfer by
 “way of gift to the *masjid*, and the establishing of property
 “in this manner to a *masjid* is valid being completed by
 “taking possession. * * * * * If he say I have
 “given my mansion to the *masjid*, it is valid as a transfer
 “requiring delivery. If he should say, ‘this tree to the
 “*masjid*’ it would not belong to the *masjid* until delivered to
 “the manager of the *masjid*.”

In paragraph 542 at page 473 Mr. Tyabji says, that any person who is competent to hold property is competent to pre-empt ; and since, as we have seen above, a mosque can hold property, there is no reason why it should not be regarded as a juristic person and therefore competent to claim pre-emption.

But the appellant's learned advocate relies on Illustration (3) given at page 472 of Mr. Tyabji's book, which is as follows:—

“Part of a land is *waqf*, and the other part belongs to
 “S., who sells it to B. Neither the *mutawalli* of the *waqf*
 “nor the beneficiary under it, not even if he be” a single
 “individual,” can pre-empt.”

This illustration is based partly on Volume II, page 178, and partly on Volume I, page 473, of Baillie's Digest of Muhammadan Law. Volume II of the Digest relates to Imameea or Shia Law and we are not concerned with it in this case ; it is the Hanafi law that we have to look to in this connection ; and that law is dealt with in Volume I of Baillie's Digest. At page 473 of that Volume the 6th condition of the exercise of the right of pre-emption is set out in these terms :

“There must be *milk* or ownership of the *Shufee*, or pre-emptor, at the time of the purchase, in the mansion on account of which he claims the right of pre-emption. So that he
 “has no right on account of a mansion of which he is merely

“ the tenant for hire, or that he has sold before the purchase or has converted into a *masjid* or place of worship.”

At page 474 of the same Volume the following passage occurs :—

“ When it is said that *alar* are proper objects of the right of pre-emption, it is by virtue of a right of *milk*, or ownership, that they are so. Hence, if a mansion were sold by the side of a *waqf*, the appropriator would have no right of pre-emption ; nor could the *mutawalli* or Superintendent take it under that right.”

It was this passage (which occurs at page 478 of the 2nd edition of Baillie's Digest) that was relied upon in the unpublished decision of this Court in Civil Appeal No. 1525 of 1882, which is cited with approval in Sir William Rattigan's Digest of Customary Law, 7th Edition, page 161.

The case of 1882 was a case in which the pre-emptor, who was a *mutawalli* of a mosque had claimed pre-emption in respect of certain property which adjoined certain *Hujras* attached to the mosque, and Mr. Justice Rattigan held that since the *Hujras* by virtue of which the plaintiff claimed pre-emption were part of *waqf* property he had not such a proprietary right or *milk* in the *Hujras* as to found a claim for pre-emption upon them.

Now, the proposition laid down in Baillie's Digest does not find support from the recent authorities on Muhammadan Law ; but even if the doctrine of Muhammadan Law were as stated by Baillie, it does not follow that in the present case the plaintiff, as *mutawalli* of the mosque which is adjacent to the property sold, has no right of pre-emption in respect of it under section 13 (1), clause *seventhly*, of the Punjab Pre-emption Act. Under the said clause it is not, in our opinion, an essential condition of the valid exercise of the right of pre-emption by the present plaintiff that he should be proprietor of the mosque in the same sense in which he would be, for instance, proprietor of his own private dwelling house ; all that it is necessary for him to establish is, that he is the sole guardian and manager of the mosque and of the property appertaining thereto, that the legal ownership in the mosque and the property attached does not vest in any other person, and that he alone deals and is entitled to deal with the outside world on behalf and for the benefit of the mosque in all its legal relations. It is in this sense that the *mutawalli* of a mosque or the manager of a Hindu religious institution, by whatever name he may be called, can be appropriately said to be “ a person whose immovable property,” though

it is not his private property, clothes him with a right of pre-emption regarding property contiguous to the mosque or temple, as the case may be, under clause *seventhly* of section 13 (1) of the Punjab Pre-emption Act.

So far as the enactment in question is concerned, there can be no distinction whatever between a temple or *dharmshala* and a mosque; both are religious buildings or institutions and as such have been treated exactly alike in sub-section (2) of the section, and if the manager of a temple or *dharmshala* is competent to bring a suit for pre-emption (which is not disputed), there is no reason in principle why the *mutawalli* of a mosque should not be able to exercise the same right, apart altogether from the provisions of the Muhammadan Law.

No. 100 P. R. 1885 (1), and I. L. R. 26 All. page 212 (2), are clear authorities in support of the view that no real distinction exists as regards the applicability of the rule of pre-emption between the two classes of religious institutions. In the Allahabad case it was held that a manager of a Hindu temple who as such manager holds a *zamindari* property on behalf of the temple, has the same rights of pre-emption under the village *Wajib-ul-arz* as any other *zamindar* in the village may possess. Similarly, in No. 100 P. R. 1885 (1) our own Court held that there is no rule of law which prevents the proprietors of a *dharmshala* or similar institutions from claiming pre-emption under the pre-emption law and we entirely fail to understand on what principle the position of the *mutawalli* of a mosque can be differentiated from that of the manager of a *dharmshala* for purposes of the law of pre-emption. If there is no distinction between the two cases, it is clear that the present plaintiff was competent to bring his suit for pre-emption under the Punjab Pre-emption Act.

The grounds upon which the *mutawalli* of a mosque should be allowed to exercise a right of pre-emption are very fully discussed in No. 153 P. R. 1884 (3), and we entirely agree in the view expressed by the learned Judges in the following passage in their judgment in that case:—

“As to the second point we are of opinion that though theoretically *wagf* property belongs to no human owner, nevertheless a mosque—as a concrete example of *wagf*—is an institution, and its possession is legally maintained by its lawful guardian for the time being; in virtue of his position the guardian can resist trespass, recover debts, make purchases and mortgages, all in virtue of the right which resides in the institution. In

(1) 100 P. R. 1885 (*Shah Bodhray v. Sunlar Singh*).

(2) (1903) I. L. R. 26 All. 212 (*Lekhraj v. Gurdatt*).

(3) 153 P. R. 1884 (*Shankar Das v. Said Ahmad*).

“ the same way, we think, the mosque as an institution might
 “ acquire an easement by prescription and that being so, we
 “ cannot think of any rule or principle by which we could deny
 “ to the mosque (as an institution) the same right of preventing
 “ strangers approaching its walls by the exercise of a right of
 “ pre-emption, as other house-holders have. The object of the
 “ right of pre-emption is to secure the cohesion of families, and
 “ obviate the inconvenience of a mixed or alien neighbourhood
 “ among private house-holders. Now, it can hardly be denied that
 “ exactly the same convenience which results to a private house
 “ from the exercise of the right, may result also to a mosque.

“ We have no hesitation in deciding, on this principle, that
 “ the mosque as an institution has practically proprietary rights
 “ exercised through the guardian, and that one of the rights is
 “ to claim, on the ground of vicinage, a right of pre-emption in
 “ the case of sales of adjoining properties.”

For the foregoing reasons, we hold that the plaintiff-respondent, Khuda Bakhsh, in his capacity of *mutawalli* of the Bohar Darwazewali mosque, had a right of pre-emption in respect of the property sold; and we accordingly maintain the decree of the lower appellate Court and dismiss this appeal with costs. The cross-objections filed by the plaintiff-respondent under order XLI, rule 23, Civil Procedure Code, have not been pressed by his counsel and we reject them.

Appeal dismissed.

No. 60.

Before Hon. Mr. Justice Shah Din and Hon.

Mr. Justice Chevis.

BASAWA SINGH—(PLAINTIFF)—APPELLANT

Versus

NATHA SINGH AND OTHERS—(DEFENDANTS)—
 RESPONDENTS.

Civil Appeal No. 196 of 1912.

Punjab Pre-emption Act, II of 1905, section 12 (c) secondly—whether a thulla is a sub-division, within meaning of the clause.

Where it was found, as in this case, that the village was divided into two *pattis*, called *patti Jatan* and *patti Gujarani*, and that *patti Jatan* was further divided into two *thullas*, and each *thulla* had a separate *shamilat thulla*, in which the proprietors of the other *thulla* had no share, and each *thulla* was entered in and authenticated by the Settlement Record—

Held, following the principle laid down in 169 P. R. 1889 (1), that the *thullas* were sub-divisions of the village within the meaning of section 12 (c)

(1) 169 P. R. 1889 (*Bhagat Hira Nand v Lal Khan*).

secondly of the Punjab Pre-emption Act, 1905, notwithstanding that the sub-division of *patti* Jatan into two *thullas* was made on the *khet bat* and not on the *chak bat* principle.

69 F. R. 1893 (1), 76 P. R. 1894 (2), 45 P. R. 1897 (3) and 142 P. L. R. 1905 (4), referred to.

Second appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Ludhiana Division, dated the 19th December 1911.

Lajpat Rai, for appellant.

Dasaundha Singh, for respondents.

The judgment of the Court was delivered by—

10th March 1914. SHAM DIN, J.—This appeal and appeal No. 197 of 1912

are connected and both will be disposed of in one judgment. These two appeals have arisen out of two pre-emption suits brought by Basawa Singh, plaintiff, against the defendants in respect of two separate plots of agricultural land which are situate in *thulla* Hari Singh of *manza* Burj Hari Singh, *tahsil* Jagraon, District Ludhiana, and which were sold by two sale-deeds, dated the 15th June 1908 and 1st May 1909, respectively.

One of the pleas raised by the vendees was that the *thulla* in which the lands in suit are situate is not a sub-division of the village within the meaning of section 12 (c), *secondly*, of the Punjab Pre-emption Act, II of 1905, and that therefore the plaintiff had no preferential right of pre-emption as against the vendees.

We may state here that the village is divided in two *pattis*, called *patti* Jatan and *patti* Gujaran, and *patti* Jatan is further sub-divided into two *thullas* known as *thulla* Hari Singh and *thulla* Gattu Singh. The land in suit is situate in *thulla* Hari Singh; and the plaintiff is also a land-owner in that *thulla*. Of the ten vendees three own lands in *thulla* Hari Singh, but the rest do not, having only a share in the *shamilat* of *patti* Jatan. If *thulla* Hari Singh be held to be a sub-division of the village within the meaning of clause (c) of section 12 of the Pre-emption Act, then it is clear that the plaintiff has a superior right of pre-emption not only against the vendees who own no land in the said *thulla* but also against the three vendees, who are land-owners therein, inasmuch as the last-mentioned vendees have by associating with themselves in the purchase persons who are strangers forfeited their own right of pre-emption.

(1) 69 P. R. 1893 (*Uttam v. Buta*).

(2) 76 P. R. 1894 (*Sadda v. Majja Singh*).

(3) 45 P. R. 1897 (*Bija v. Bishan Singh*).

(4) 142 P. L. R. 1905 (*Sher Singh v. Maluk Singh*).

The first Court held that *thulla* Hari Singh is a recognized sub-division of the village, and therefore decreed the plaintiff's claim in each suit. On appeal the Divisional Judge has come to a contrary conclusion holding that *thulla* Hari Singh was not such a well-marked section of the village as to be considered a sub-division of it for purposes of pre-emption. He has accordingly held that the plaintiff has not a preferential right of pre-emption in respect of the lands sold and has dismissed both the suits.

The question involved in both these second appeals is whether or not *thulla* Hari Singh is a sub-division of village Burj Hari Singh within the meaning of section 12 (c), *secondly*, of Act II of 1905.

For the appellants reliance has been placed upon No. 169 *P. R.* of 1889 (p. 588, para. 2) (1), No. 69 *P. R.* 1893 (2) and No. 76 *P. R.* 1894 (3), while the pleader for the respondents has cited No. 45 *P. R.* 1897 (4), and an unpublished decision of the Court in Civil Appeal No. 518 of 1902, printed as No. 142 *P. L. R.* 1905 (5).

The history of the village which is given in the *Shajra-nasab* of the settlement of 1882 shews that the village was founded in *Sambat* 1882, and that soon after its foundation it was divided into two equal *pattis* called *patti* Jatan and *patti* Gujuran, the division of the village area taking place on the *chak-bat* principle. Thereafter the land comprised in *patti* Jatan was divided half and half and constituted into two *thullas*, *thulla* Hari Singh and *thulla* Gattu Singh, but the division was made on the *khet-bat* basis. The lands in *thulla* Hari Singh are said to be owned by 13 tribes, eight of which are *Jats* of different *gots*.

The Divisional Judge has held that since the lands of *patti* Jatan were divided into two *thullas* on the *khet-bat* principle, and not on the *chak-bat* basis, neither of the two *thullas* can be regarded as a sub-division of the village within the meaning of section 12 (c) of the Punjab Pre-emption Act.

Now, in No. 169 *P. R.* 1889 (1), where the question for decision was whether a *taraf* in *manzu* Rawalpindi (which, according to the entries in the Settlement Record, was divided into *tarafs*) was or was not a sub-division within section 12, clauses (c) and (d), of the Punjab Laws Act, it was observed by Rivaz, J. :—"There is nothing in section 12 of the Punjab Laws Act which leads us to believe that the term 'sub-divi-

(1) 169 *P. R.* 1889 (*Bhagat Hira Nand v. Lal Khan*).

(2) 69 *P. R.* 1893 (*Uttam v. Buta*).

(3) 76 *P. R.* 1894 (*Sadda v. Majja Singh*).

(4) 45 *P. R.* 1897 (*Bija v. Bishan Singh*).

(5) 142 *P. L. R.* 1905 (*Sher Singh v. Malik Singh*).

"sion" in clauses (c) and (d) is to be construed with reference to any particular principle of division. All that is necessary to show to bring a case within the above clauses is that the village is divided into recognized sub-divisions, and it is shewn by the *Patwari's* evidence and the other evidence in this case that Rawalpindi is so divided and that the boundaries of the *taraf* are entered in the Settlement Record."

No. 69 P. R. 1893 (1), was a case relating to village Baddowal in the Ludhiana District. The village was divided into two *pattis*, each of which was sub-divided into *thullas*. The plaintiffs claimed pre-emption on the ground that their land and the land sold was in the same *thulla*, whereas the vendees held no land in this *thulla*, but in another *thulla* of the same *patti*. It was held by this Court that the *thullas* were sub-divisions within the meaning of section 12, clauses (c) and (d) of the Punjab Laws Act. Mr. Justice Rivaz in the course of his judgment says:—"There appears to us to be no straining of language necessary to enable us to hold in construing the above clauses, that a village sub-divided into *Pattis*, which are again sub-divided into *thullas*, may be not incorrectly spoken of as sub-divided into *thullas*..... On principle.....it seems most desirable that in villages at least a proprietor holding land in any sub-division recognized by the Settlement Record, be it a *taraf*, *patti*, *thulla* or *Dheri*, should have, as regards land sold in that sub-division, a right superior to any one whose land is outside it..... On the whole, then, we are of opinion that the intention of the Legislature in enacting clauses (c) and (d) of section 12 of the Act was not only to recognize the name or primary sub-divisions of the village, but also any further divisions of such sub-divisions as are well marked and are authenticated by the Settlement Record and the history of the village."

In 76 P. R. 1894 (2), it was held that where a *patti* of a village is sub-divided into *thullas* a *thulla* may be a sub-division of the village within the meaning of clause (d) of section 12 of the Punjab Laws Act, and in the particular instance before the Court it was found that the *thulla* in which the land sued for was situate was such a sub-division.

No. 45 P. R. 1897 (3), was a case relating to *Mauza Jhalian Khurd* which, according to the pre-emptor, was divided into two *pattis*, one of *Sainis* and the other of *Jats*, and the

(1) 69 P. R. 1893 (*Uttam v. Buta*).

(2) 76 P. R. 1894 (*Sadda v. Majja Singh*).

(3) 45 P. R. 1897 (*Bija v. Bishan Singh*).

claim was based on the ground of the plaintiff being a land-owner in the *patti* in which the land sued for was situate. This Court found that there were no recognized *pattis* in the village. At page 203 of the record the judgment runs as follows :—“ We are of opinion that on the whole the finding on it (*i.e.*, on the question whether the *Sainis* and *Jats* were members of distinct *pattis*) must be that they are not. There is admittedly no territorial division between the two groups. The Settlement Record does not recognize any *pattis*. On the contrary the *Shajra-nasib* says that there are none. The two sections hold their lands for the most part in different portions of the village, but some lands lie intermixed..... There is no *Shamilat Patti* and nothing common to one group of proprietors in which the members of the other group have no interest. The *Shamilat* of the village was lately divided, not according to *pattis*, but among proprietors according to *khevat* taking the village as a whole.....The fact that the Settlement Record does not recognize any subdivisions in the village based on the separate grouping of the *Jat* and *Saini* proprietors seems to us to be a very strong argument against giving superiority to the plaintiff under section 12, clause (d).”

In the unpublished decision in Civil Appeal No. 518 of 1902 it was held that in village *Phern Shehar*, *Tahsil Ferozepur*, *zails* into which a *patti* was sub-divided were not subdivisions of the village for the purposes of section 12 (c) of the Punjab Laws Act, as a reference to the history of the village and the Settlement Record showed that the *zails* in question were constituted by mere arbitrary grouping together of certain holdings, so as to form an association of proprietors with no connecting ties of any great sort. Within the *zails* there was no measure of rights other than actual possession, and the village as a whole was classed in the Record as *Bhaia-chara*. The learned Judges observed that no rule of universal application can be laid down as to what constitutes the village sub-divisions for the purposes of Pre-emption Law, and they were of opinion that “ there must be some one or more well-defined attributes to justify treatment of a section of... a village as a sub-division.....and in determining the point, the first thing to be looked to is the history of the village so far as it can be ascertained from the Settlement Record.”

In the present case we find that each of the two *thullas* in *Patti Jatan* has a separate *Shamilat thulla* in which the pro-

prietors of the other *thulla* have no share, and that each *Thulla* is entered in and authenticated by the Settlement Record.

In view of the observations of the learned Judges in No. 169 *P. R.* of 1889 (1), that the term “sub-division” is not to be construed with reference to any particular principle of division, we are unable to agree with the Divisional Judge that, because *Patti Jatan* has been sub-divided into two *thullas* on the *Khet-bat* principle, therefore *Thulla Hari Singh*, in which the land in suit is situate, is not a sub-division of the village within the meaning of section 12 (c), *secondly*, of the Punjab Pre-emption Act No. 45 *P. R.* of 1897 (2), on which the Divisional Judge has laid so much stress does not help the vendees at all, because there the Settlement Record of the village not only did not recognize any *pattis*, but, on the contrary, the *Shajra-nasab* distinctly stated that there were none. There was no separate *Shamilat Patti* at all, and the *Shamilat* of the whole village was held in common.

On the whole, then, we are of opinion that *Thulla Hari Singh* is a sub-division within section 12 (c), *secondly*, of Act II of 1905; and it follows that the plaintiff has a preferential right of pre-emption as against the vendees in respect of the lands in dispute in the two suits. We therefore accept both the appeals, and, setting aside the decrees of the Divisional Judge, we remand both the suits to him under order XLI, rule 23, Civil Procedure Code, for decision on the merits. The stamp on each appeal will be refunded and other costs will be costs in the cause.

Appeal accepted.

No. 61.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chavis.

DULLA SINGH AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

KHAZANA AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 655 of 1911.

Indian Contract Act, IX of 1872, section 70—co-sharers—contribution towards expenses of litigation carried on by some co-sharers which benefitted all.

Plaintiffs and defendants are co-sharers in a joint *khata*. The land formerly belonged to one K. S. and on his death was taken posses-

(1) 169 *P. R.* 1889 (*Bhagat Hira Nand v. Lal Khan*).

(2) 45 *P. R.* 1897 (*Bija v. Bishan Singh*).

sion of by two trespassers. Plaintiffs recovered it from the trespassers by suit. Defendants subsequently applied to the Revenue authorities for partition and plaintiffs then brought the present suit for a declaration that defendants are not entitled to partition until they pay the plaintiffs a sum of Rs. 500 as their share of the expenses of the former litigation.

Held, following the principle laid down in *I. L. R. 21 Cal. 496 (P.C.)* (1)—

That plaintiffs, not having been in any way authorised by the defendants to enter into the former litigation, in which expense had been incurred, were not entitled to recover any portion of that expense from the defendants.

I. L. R. 30 Mad. 526 (2), *118 P. R. 1888* (3) and *70 P. R. 1900* (4), referred to.

Held also, that section 70 of the Contract Act has no application to the case.

I. L. R. 11 All. 234 (242, 243) (5), followed.

Further appeal from the decree of T. P. Ellis, Esquire, Additional Divisional Judge of Hoshiarpur, at Ludhiana, dated the 3rd day of October 1910.

Roshan Lal, for appellants.

Brij Lal, for respondents.

The judgment of the Court was delivered by—

CHEVIS, J.—The plaintiffs and defendants are co-sharers 14th March 1914. in a joint *khata*. The land formerly belonged to one Kapur Sing and on his death, two trespassers, named Ram Singh and Narain Singh, took possession. The present plaintiffs sued them, and Ram Singh and Narain Singh brought a cross-suit against the present plaintiffs. Plaintiffs were successful and recovered the property from Ram Singh and Narain Singh. Recently the defendants applied to the revenue authorities for partition, and the plaintiffs then objected that defendants should contribute their share of the expenses of the former litigation. The plaintiffs have now brought this suit for a declaration that defendants are not entitled to partition until they pay the plaintiffs a sum of Rs. 500 as their share of the expenses of the former litigation.

Both the lower Courts have dismissed the claim, holding, on the strength of *30, Mad. 526* (2), and *21 Cal. 496* (1), that, in the absence of any contract, the defendants are not liable for any portion of the costs of the former litigation. The plaintiffs have preferred a further appeal to this Court.

(1) (1893) *I. L. R. 21 Cal. 496 (P.C.)* (*Abdul Wahid Khan v. Shaluka Bibi*).

(2) (1907) *I. L. R. 30 Mad. 526* (*Halima Bee v. Roshan Bee*).

(3) *118 P. R. 1888* (*Azmat v. Gurmukh*).

(4) *70 P. R. 1900* (*Sahib Singh v. Sher Singh*).

(5) (1838) *I. L. R. 11 All. 234* (242, 243) (*Chedi Lal v. Bhagwan Das*).

The ruling of the Privy Council in 21 Cal. 496 (1) seems to us conclusive. In that case plaintiffs and defendants were co-sharers in an estate. The defendant being in possession of the estate the plaintiffs sued for possession of their share. One of the pleas raised by the defendant was that plaintiffs should pay their share of money which defendant had expended in good faith in litigation for the protection of the estate. The decision of their Lordships on this part of the case is to be found on page 504, and is as follows —

“The proceedings were taken by the defendant for his own benefit and without any authority, express or implied, from the plaintiffs; and the fact that the result was also a benefit to the plaintiffs does not create any implied contract or give the defendant any equity to be paid a share of the costs by the plaintiffs.”

We are unable to distinguish the present case from the above. The fact that in the present case it is the plaintiff who is seeking to make the defendants liable, makes no difference whatever to the principle. The above ruling is followed in 30 *Mad.* page 526 (2), and as the learned Divisional Judge remarks, there is no ruling to the contrary. The Divisional Judge rightly finds that 118 *P. R.* 1888 (3), and 70 *P. R.* 1900 (4), which were cited before him, do not help the plaintiffs; in the former case the only question argued before the Chief Court was, whether the suit was cognizable by a small Cause Court and in the latter case the only question before the Chief Court was, whether the matter in dispute was *res judicata*.

In the first Court it was argued that section 70 of the Contract Act was applicable to such cases. This was not argued before us, and we need only say that we fully agree with what is said in 11 *All.* 234 (see pages 242 and 243) (5), as to the non-applicability of section 70 to such cases.

In the present case it is not argued before us that the plaintiffs were in any way authorized by the defendants to enter into the former litigation, and the Privy Council ruling—21 *Cal.* 496 (1)—fully applies. We dismiss the appeal and uphold the decision of the lower Courts dismissing the claim, but it is, as the learned Divisional Judge remarks, rather hard on the plaintiffs

(1) (1893) *I. L. R.* 21 *Cal.* 496 (P.C.) (*Abdul Wahid Khan v. Shaluka Bibi*).

(2) (1907) *I. L. R.* 30 *Mad.* 526 (*Halima Bee v. Roshan Bee*).

(3) 118 *P. R.* 1888 (*Azmat v. Gernukh*).

(4) 70 *P. R.* 1900 (*Sahib Singh v. Sher Singh*).

(5) (1893) *I. L. R.* 11 *All.* 234 (242, 243) (*Chedi Lal v. Bhagwan Das*).

that the defendants should reap the profit of the former litigation without having to bear a share of the expenses, and we pass no order as to costs of this appeal.

Appeal dismissed.

No. 62.

*Before Hon. Mr Justice Johnstone and Hon. Mr.
Justice Shadi Lal.*

JALAL DIN AND OTHERS—(DEFENDANTS)—APPELLANTS

Versus

QAIM DIN—(PLAINTIFF)—AND MUSSAMMAT UMAR BIBI
AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1089 of 1911.

*Civil Procedure Code, 1908, order 6, rules 1, 2 and 17—amendment of
plaint—accidental omission of part of the property in a pre-emption suit—
date of institution of suit, where amendments are allowed.*

On 7th April 1908 a property was sold consisting of 41 *kanals* 18 *marlas* of land, the second floor of a house, share in a well and share of *shamilat*. On 30th March 1909 a suit for pre-emption was brought, but in the plaint the property asked for was described merely as 41 *kanals* 18 *marlas* of land. On 12th May 1909 plaintiff applied for leave to amend saying, he had not intended to renounce any part of the claim but had by a *kitabi ghalti* omitted the house. The Court sanctioned the amendment and it was made. Still the share of the well and of *shamilat* was left out. On 4th February 1910 this defect was pointed out by vendee's pleader and the plaint was on same day returned for amendments and put in finally fully amended on 16th February 1910.

Held, that order 6, rule 17, allows amendment of any part of a plaint, provided the amendment does not alter the character of the suit or introduce a different cause of action.

Held also, that this was a case of inadvertence and misdescription of property claimed and not of an intentional omission and the amendments were accordingly admissible.

I. L. R. 33 Bom. 644, (1), I. L. R. 17 All. 288, (2), I. L. R. 33 All. 616, (3), I. L. R. 36 Mad. 378 (4), 7 P. R. 1896 (5), and 10 P. R. 1909 (6), referred to.

Held, further that where a plaint has been rightly amended the date of institution of the claim is the date of presentation of the original, and not the amended, plaint.

I. L. R. 9 Bom. 373 (7) and I. L. R. 19 Bom. 320 (8), referred to.

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- (1) (1909) *I. L. R. 33 Bom. 644* (*Kisandas Rup Chand v. Rachappa*).
 (2) (1895) *I. L. R. 17 All. 288* (*Barkat-un-nisa v. Muhammad Asad Ali*).
 (3) (1911) *I. L. R. 33 All. 616* (*Muhammad Sadiq v. Abdul Majid*).
 (4) (1911) *I. L. R. 36 Mad. 378* (*Sevugan Chetty v. Krishna Aiyangar*).
 (5) 7 P. R. 1896 (*Jasbir Singh v. Rahmatulla*).
 (6) 10 P. R. 1909 (*Banarsi Das v. Haji Abdul Ghani*).
 (7) (1885) *I. L. R. 9 Bom. 373* (*The New Fleming Spinning and Weaving Company v. Kessowji Naik*).
 (8) (1894) *I. L. R. 19 Bom. 320* (*Ratal Majidul vs Bqi Parsagn*) and 10

Further appeal from the decree of S. Wilberforce, Esquire, Divisional Judge, Lahore, dated the 2nd June 1911.

Sewa Ram Singh and Nabi Bakhsh, for appellants.

Parduman Das, for respondents.

The judgment of the Court was delivered by—

19th March 1914.

JOHNSTONE, J.—On 7th April 1908 a property was sold consisting of 41 *kanals* 18 *marlas* of land, the second storey of a house, share in a well and share of *shamilat*. Suit for pre-emption was instituted on 30th March 1909, but in the plaint the property asked for was described merely as 41 *kanals* 18 *marlas* of land. On 12th May 1909 plaintiff applied for leave to amend, saying he had not intended to renounce any part of the claim but had by a "*kitabī ghalti*" omitted the house. The Court ruled that such amendment was permissible by law and should be made. It was accordingly made, and the house was added; but still share of well and of *shamilat* was left out. This defect was pointed out by vendee's pleader on 4th February 1910, and the plaint was on the same day returned for amendment, and it was put in, finally and fully amended, on 16th February 1910.

The first Court, having held that the making of these amendments after the expiry of the ordinary period of limitation for such a suit did not "bar the suit," proceeded to find for plaintiff on the main question and gave him a decree for pre-emption on payment of full price; *i.e.*, on payment of full price for the equity of redemption, leaving him to pay the rest of the purchase-money to the mortgagee at his own will and pleasure.

In appeal to the Divisional Court the vendees merely asked that the suit should be dismissed as time-barred, because it was only after expiry of the period allowed by law that the *whole* property was demanded and because in pre-emption suits the whole bargain must be sued for and not a part. The lower Appellate Court ruled, however, that the omissions in the original and first amended plaints were merely due to carelessness, that plaintiff's intention from the beginning was to sue for the whole bargain, and that the *character* of the suit was not changed by the amendments.

Having lost the day in that Court, the vendees instituted this further appeal, and we have heard arguments. In our opinion everything points to the conclusion that we have here merely a case of inadvertence and misdescription of property claimed. No doubt plaintiff offered only Rs. 999 out of the Rs. 1,565 stated as price in the sale-deed, and, if he

had offered this reduced sum on the ground that he only wanted part of the property, his suit would perhaps have failed; but nothing of this sort happened. He recognized Rs. 1,365 as the price stated for the property he claimed, but urged that of it Rs. 366 was fictitious; and from this it is clear that he wanted to take over the whole bargain.

Appellants' pleader first discusses the law in regard to amending plaints as contained in order VI, Civil Procedure Code. He argues that rule 17 of that order only allows amendments of *pleadings*, and then, turning to rule 2, urges that the claim made by a plaintiff is not the same as his pleadings, which only include the "material facts on which the party 'pleading relies for his claim:'" but this contention appears to us sophistical. Rule 1 of the same order says, "Pleading 'shall mean plaint or written statement;'" and it follows that rule 17 allows amendment of any part of a plaint, of course, provided the amendment does not alter the character of the suit or introduce a different cause of action.

The lower appellate Court relied upon *I. L. R.* 33, *Bom.* 644, (1), and 17, *All.* 288 (2). As regards the former ruling Mr. Sewa Ram Singh contends that it lays down (p. 650) that amendment may be allowed only, if it does not work injustice to the opposite party. Here, he says, by the lapse of a year, his clients had acquired a valuable right, pre-emption is in its nature not a natural but an artificial right, and it was unjust to allow an amendment calculated to deprive appellants of the valuable right aforesaid. Arguments of this sort may have some validity in cases in which the defects in a plaint were intentional; but we can see in the action of the first Court here no injustice to appellants on a reasonable view of all the circumstances.

The Allahabad ruling is met by the contention that there the defect in the original plaint was the omission of a minute fractional share in describing the share of the land sued for, while here the part omitted was distinct property different in *kind* from that included in the original prayer. This distinction certainly exists; but in our opinion this distinction is immaterial, the real test being, in our opinion, whether the omission was intentional or merely inadvertent. Nor do we think that the mere fact that on the plaint as originally framed Court-fee was paid only on the land mentioned in it is proof that plaintiff did not, in reality, want the whole bargain.

(1) (1909) *I. L. R.* 33 *Bom.* 644 (*Kisandas Rupchand v. Rachappa*).

(2) (1895) *I. L. R.* 17 *All.* 288 (*Barkat-un-Nisa v. Muhammad Asad Ali*).

We do not think our view requires any elaborate justification. We may, however, refer to *I. L. R. 33 All. 616* (1), where the test was taken to be whether the amendment introduced a new cause of action, and, as it did not, an amendment increasing the share sued for was allowed even after the period of limitation had expired; to *I. L. R. 36 Mad. 378* (2), where amendment by way of prayer for further relief was allowed after expiry of limitation; to *7 P. R. 96* (3), in which the test was taken to be whether the matter to be added had been "purposely excluded" in the original prayer; to the discussion of the converse case in *10 P. R. 1909* (4); and to such rulings as *I. L. R. 9 Bom. 373* (5), and *19 Bom. 320* (6), in which it has been laid down that, where a plaint has been rightly amended, the date of institution of the claim is the date of presentation of the original and not of the amended plaint.

For these reasons we agree with the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

No. 63.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Beadon.

SUNDAR SINGH AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

KRISHNA MILLS CO., LTD.—(DEFENDANT)—
RESPONDENT.

Civil Appeal No. 885 of 1911.

Indian Contract Act, IX of 1872, section 39—non-payment of previous balance—whether other party justified to rescind the contract—appeal by two out of four plaintiffs—common ground—Civil Procedure Code, 1908, order 41, rule 4.

The plaintiffs, members of a firm, claimed damages from the defendant Company on account of alleged breach of contract. The lower Court finding that plaintiffs were guilty of the breach, which put an end to the contract, dismissed the suit. Two of the four plaintiffs appealed to the Chief Court. The terms of the contract were delivery as required by plaintiffs, on payment

- (1) (1911) *I. L. R. 33 All. 616* (*Muhammad Sadiq v. Abdul Majid*).
- (2) (1911) *I. L. R. 36 Mad. 378* (*Sevugan Chetty v. Krishna Aiyangar*).
- (3) *7 P. R. 1896* (*Jasmir Singh v. Rahmatulla*).
- (4) *10 P. R. 1909* (*Banarsi Das v. Haji Abdul Ghani*).
- (5) (1885) *I. L. R. 9 Bom. 373* (*The New Fleming Spinning and Weaving Company v. Kessowji Naik*).
- (6) (1891) *I. L. R. 19 Bom. 320* (*Patel Mafatlal v. Bai Parson*).

of the amount due on delivery of Railway receipt. It appeared, however, that several deliveries of yarn were made without such cash payment and an account was made up on 14th April 1909 when a sum of about Rs. 2,000 was found due to the defendant. After the 14th April and up to 2nd May 1909 further deliveries were made, of which cash payments were made on delivery of Railway receipts and then came a dispute about a consignment of 13 bales which resulted in the final rupture between the parties and the termination of the contract.

After the account was made up on 14th April plaintiffs made over to defendant first halves of currency notes for Rs. 2,000, but admittedly they withheld the second halves of those notes and consequently the payment was not completed, and the question was whether the defendant was justified in rescinding the contract on plaintiff's refusal to deliver the second halves of those notes.

Held, that the failure by the plaintiffs to pay for the goods, which had at first been delivered on credit, was not a renunciation of the contract or such a refusal as would excuse performance of the contract on the part of the defendant under the terms of section 39 of the Contract Act.

I. L. R. 36 Cal. 617 (1), I. L. R. 33 Cal. 477 (F. B.) (2) L. R. 9 C. P. 208 (3), I. L. R. 4 Cal. 252 (4) and I. L. R. 9 Mad. 359 (5), referred to.

Held also, that as the decree appealed from proceeds on a ground common to all the plaintiffs the Chief Court could deal with the whole decree, *vide* order 41, rule 4 of the Code of Civil Procedure.

First appeal from the decree of Munshi Rahim Bakhsh, Subordinate Judge, 1st Class, Amritsar, dated the 21st April 1911.

Shadi Lal and Rallia Ram for appellants.

Lajpat Rai for respondent

The judgment of the Court was delivered by—

BEADON, J.—This appeal relates to a suit in which the 24th Nov. 1913. plaintiffs, members of a firm at Amritsar, claim damages from defendant, the Krishna Mills, Limited, at Beawar, District Ajmer, on account of an alleged breach of contract. The lower Court finding that plaintiffs were guilty of the breach which put an end to the contract has dismissed the suit and the appeal has been instituted by two of the four plaintiffs.

A preliminary objection was raised that the dismissal of the suit is final as against the two plaintiffs who have not joined the appeal, and that the claim in appeal must be confined to the shares of the two appellants in the sum alleged to be due from defendant on account of damages.

(1) (1909) *I. L. R. 36 Cal. 617* (*Cooverjee Bhoja v. Rajendra Nath*).

(2) (1906) *I. L. R. 33 Cal. 477 (F. B.)* (*Rash Behary v. Nrittya Gopal*).

(3) (1874) *L. R. 9 C. P. 208* (*Freeth v. Burr*).

(4) (1878) *I. L. R. 4 Cal. 252* (*Sooltan Chund v. Schiller*).

(5) (1886) *I. L. R. 9 Mad. 359* (*Simson v. Virayya*).

The lower Court has not gone into the question of the alleged amount of the damages, but has dismissed the suit on the preliminary finding that plaintiffs are not entitled to claim damages, and if that preliminary finding is set aside the case will have to be remanded. The claim in appeal is for the reversal of this decree which proceeds on a ground common to all the plaintiffs, and in view of order XL1, rule 4, Civil Procedure Code, the preliminary objection was overruled.

The parties entered into the contract in question on the 4th February 1909, and it is admitted that they agreed to the terms set forth in exhibit P-1, printed at page 3 of the paper book, part I. This document consists of a letter, dated 4th February 1909, written by a member of the plaintiffs' firm to the defendant and confirmed by defendant's agent. The letter runs as follows :—

“ On account and risk of my firm of the name of Messrs. Kishen Chand Jawahar Singh of Amritsar, I agree to have bought from you in Beawar 621 bales of yarn as under :—

(1) 571 bales at Rs. 3-1-3 per bundle of $10\frac{1}{2}$ seers for upper counts, an anna per count to be added to this rate up to 17 seers.

50 bales of 20 yarn at Rs. 3-11-0 per bundle less discount at Re. 1-6-0 per cent. of the value of yarn and brokerage at Re. 1-4-0 per bale.

(2) We will send for the bales of counts according to our requests clearing the lot up to the 15th April 1909 at the latest.

(3) You will have not to sell yarn to any merchant in Punjab up to 30th April 1909 and we on our part shall not buy any yarn from any other Mills in Rajputana during that period.

(4) This bargain is your mills' godown delivery. You will despatch the goods from your station to places in Punjab according to our requirements, of which the railway receipts we will receive from your clerk in Amritsar on payment of the amount of invoice of such railway receipts.

(5) If on any cause your mills close spinning yarn wholly or partially you will not be bound to abide by the delivery time, but shall be given furtherance of time at our option.

It appears that there had been other dealings between the parties, and it is admitted that, in spite of the condition regarding cash payment on delivery of railway receipts, there were several deliveries of yarn under the contract now in question without such cash payment. The amounts due from the plaintiffs in respect of these deliveries were entered in an account

which was finally made up on the 14th April 1909, when a sum of about Rs. 2,000 was the balance due on the account from plaintiffs to the defendant.

After the 14th April 1909 and up to 2nd May 1909, there were further deliveries of yarn in respect of which cash payments were made on delivery of the railway receipts and then came a dispute about a consignment of 13 bales which resulted in the final rupture between the parties and the termination of the contract.

When the accounts between the parties were made up on the 14th April 1909 and a balance of Rs. 2,000 was found to be due from the plaintiffs to defendant, the plaintiffs made over the first halves of currency notes to this amount to the defendant. But admittedly they withheld the second halves of those notes and consequently the payment was not completed.

Though the plaintiffs did not make cash payments at first as required by the contract, the defendant nevertheless delivered goods without such payments and as there were no less than five deliveries on cash payment after the accounts had been made up on 14th April 1909 defendant clearly acquiesced in the continuance of the contract.

On behalf of defendant it has been urged that, although the time for delivery could be extended, the plaintiffs were bound to complete their indents by the 15th April 1909, but it does not appear that this was the intention of the parties. No complaint that indents were not received in proper time appears to have been made by the defendant either in the correspondence between the parties or in the pleadings in the lower Court. On the contrary, according to the defendant the sole reason why the last consignment of 13 bales was not delivered was that plaintiffs refused to pay the price. The correspondence shows that defendants' spinning department was closed; this contingency was provided for in the contract and obviously the period of the contract was extended by mutual consent.

Passages in the correspondence between the parties have been pointed out by counsel showing complaints by plaintiffs on the one hand that defendant was wilfully withholding consignments owing to a rise in prices and complaints by the defendant, on the other hand, that plaintiffs were delaying payment on presentation of the Railway receipts and were thus delaying to take delivery of goods. These complaints, however, appear to have been due to friction between the parties

owing to the withholding by plaintiffs of the second halves of the currency notes ; and it is a significant fact that, though there is evidence showing the dates on which consignments were despatched and the dates on which the five consignments received after the 14th April 1909 were paid for and delivered, neither party has produced evidence to show the dates of the indents, the quantity indented for in each indent or the dates on which the five consignments arrived by train at their destination.

Whether or not there was a rise in prices is a question which would affect the assessment of damages and which would have to be gone into more fully when the assessment of damages becomes necessary. But without coming to a definite finding on this point, it may be noted that at present there does not seem to be sufficient indication that deliveries were delayed on account of the rise in prices. Deliveries were delayed owing to the closing of the defendant's spinning department and while acquiescing in this delay which was provided for in the contract the plaintiffs naturally wanted to put pressure on defendant to delay as little as possible. Probably this was the motive for the withholding of the second halves of the currency notes which caused friction between the parties and led to the complaints which each addressed to the other.

Notwithstanding these complaints in the correspondence it is clear that both parties acquiesced in the continuance of the contract up to and including the delivery of the 2nd May 1909, and in order to determine which party is responsible for the breach of contract, it is necessary to ascertain as far as possible what took place after that date.

Before the delivery of the 2nd May 1909 the plaintiffs had written a letter, dated 29th April 1909, intimating that the second halves of the currency notes were being withheld because goods were not being supplied as required and that unless railway receipts were sent the defendant would be held liable to make good the plaintiffs' expected profits.

After the delivery of the 2nd May 1909 plaintiffs wrote on 7th May 1909 as follows :—

“ As we have not received any railway receipt from you in spite of our requesting you constantly, therefore we convince you are rather prepared to pay our profit at eight annas per bundle according to our letter No. 3590, dated the 29th April 1909. Kindly remit the amount being our profit on the remaining bales of our bargain. Otherwise we shall have to

take steps against you legally in Court holding you responsible of costs and consequences arising through such proceedings. In case you will not reply to this notice we shall have no more to give you any information of our doing against you. This is final."

Before receiving plaintiffs' letter, dated 7th May 1909, defendant wrote on 10th May as follows :—

" According to the terms on your contract you are bound to pay the amount of every invoice of which the railway receipt is offered you by our agent at that place. In the beginning, out of business etiquette, our agent did not literally press the procedure on you and delivered you railway receipts beforehand to receive the relative amount afterwards. But as through your irregularity in payments we have experienced much loss and inconvenience beside the company, under such circumstances, cannot any longer deliver goods on credit, we have over and over again asked you to pay our pending account in full and in future to pay the amount of invoice and receive the relative railway receipt, as is the agreement between us, but you do not care the least for all our due requirements so much so that out of our dues against you you sent us first halves of currency notes of Rs. 2,000 about three weeks ago and have held back the second halves, all this time in defiance of our incessant urgings in the matter. At present our agent has got railway receipts for 13 bales and 8 bales in our godown at that place ready for delivery to you which he has asked you several times to receive on payment in full of our dues against you which includes these second halves of Rs. 2,000 notes and the amount of these bales, but as you do not care at all about your liability we serve you this notice wanting you to hand over the second halves of currency notes to our agent Lal Chandji, pay off our balance of account in full and to receive the 13 bales on payment of their value on receipt of this notice failing which our agent has been directed to sell these bales in market and through your breach of the terms of contract we shall cancel the remaining part of your bargain, and hence you will not be entitled at all for the goods of your bargain, please take notice."

After receiving plaintiffs' letter of 7th May 1909 defendant wrote 13th May as follows :—

" We are in receipt of yours of 7th instant in reply to which we refer you to ours of 10th idem, sent to you under registered cover, in which we have fully warned you against

your quite objectionable conduct in this matter. As we told you in ours referred above if you have not handed over the second halves of Rs. 2,000 currency notes to our agent there Lala Lal Chandji, first halves of which you had sent us in part payment of our dues against you so long ago, not paid him in full the balance of our account up to date and not received the railway receipt for 13 bales and 8 bales which have been offered you so often by our agent on full payment of our dues against you including the value of these bales on receipt of the said notice, which at the latest must have been delivered you to-day, your bargain is forthwith cancelled according to the terms of our notice. Further on hearing from our agent that you have not fulfilled the terms of this notice without further serving you any notice in this matter we shall file a suit against you for recovery of our dues from you the cost of which shall further fall on you, please take note."

A letter was also written on 13th May 1909 by the plaintiffs. It was a reply to defendant's letter of 10th May and ran as follows :—

" Your favour of the 10th instant to hand, contents noted. You have not replied to our letter No. 3590, dated 29th April 1909, and No. 3899, dated 7th May 1909, but you have given us this notice so that you may not be held (sic) by this way. But you cannot be set free by this way.

You shall have to pay in any case.

Neither you sent us any invoice nor Lal Chandji delivered us any invoice for 13 bales in spite of our requests.

Under the circumstances you had better to remit our profit mutually, otherwise you shall be liable to pay same through Court.

If Lal Chandji delivers us within 3 days whatever railway receipt he has against payment we are still prepared to receive same "

With reference to defendant's letter of 13th May plaintiffs wrote on 15th May merely referring defendant to their letter dated 13th May.

The consignment of 13 bales was sold by defendant in the Amritsar market and after this a Pleader acting on behalf of the plaintiffs, wrote to defendant on 24th May 1909 as follows :—

" Under instructions from Messrs. Kishen Chand Jawahar Singh of this place I have to inform you that they are quite willing

to give you the second halves of currency notes for Rs. 2,000, the first halves of which have already been given to you provided you hand over to them the railway receipts of 13 bales of yarn that they have ordered of your Company at Beawar. They will also pay you for these 13 bales at the time of receiving the railway receipts. Kindly let me know at what time within 4 days from this day it will be convenient for you to deliver the 13 bales and receive their price and the notes above mentioned. I may add that in default of your delivering the railway receipts of 13 bales within 4 days from to-day my clients will sue your company for damages which they may incur by their not fulfilling their contract."

Defendants agent on 25th May replied to the Pleader's letter as follows :—

"With reference to your registered notice, dated 24th instant, on behalf of Messrs. Kishen Chand Jawahar Singh, I beg to bring to your notice that on receipt of the railway receipt against 13 bales in question I asked the indenters to take this up against due payment, and the money due to the Mill before this, but they never complied with my request. I may add that the Krishna Mill was also in communication on the subject with them. You will instruct your clients therefore that they should refer the matter to the Mills direct as regards half Government currency notes of Rs. 2,000 which your clients still owe to the Mills. Please warn them to remit same to them without any further loss of time, otherwise they will have to bear the consequences."

After this defendant on 1st June 1909 entered into negotiations for the supply of yarn to another firm in the Punjab, and plaintiffs having delivered the second halves of the currency notes for Rs. 2,000 to defendant on 9th June 1909 instituted the present suit on 10th June 1909.

Notwithstanding defendant's allegations and oral evidence to the contrary, it is clear from this correspondence that plaintiffs were ready and willing to take delivery of the consignment of 13 bales on payment of the price of that consignment, and that the defendant cancelled the contract, not because plaintiffs would not pay the price of the consignment but because the plaintiffs refused to deliver to defendant the second halves of the currency notes for Rs. 2,000 due on the previous account. The question therefore is whether under the provisions of section 39 of the Contract Act, the defendant on plaintiffs' refusal to deliver the second halves of these notes was justified in rescinding the contract.

I. L. R. 33 Cal 617 (1), the first authority cited on behalf of appellants related to the measure of damages in respect of a breach of contract consisting of a set of distinct contracts, and it does not help in determining the point now before us for decision.

I. L. R. 33 Cal. 477 (2) differs from the present case in that there were distinct provisions to deliver specified quantities in certain specified months, but in determining what amounts to a "refusal" in cases of this kind, the Court was guided by the view expressed by Lord Coleridge in *Freeth v. Burr* (*L. R. 9 C. P. 208*) (3) that "where the question is whether the one party is set free by the action or conduct of the other the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract."

In *I. L. R. 4 Cal. 252* (4) the terms of the contract as to payment were cash delivery—part delivery had been made by defendants and a certain sum had been paid by plaintiffs on account. Plaintiffs then made a claim for excess refraction and defendants thereupon declined to deliver the remainder of the goods unless plaintiffs paid the full amount owing for the portion that had been delivered. The plaintiffs declined to accept these terms and defendants cancelled the contract. It was held that there was no such refusal on the part of plaintiffs to perform their part of the contract as to entitle defendants to rescind under section 39 of the Contract Act.

In *I. L. R. 9 Mad. 359* (5) it was held that failure by one party to pay for goods which had been delivered did not amount to a renunciation of the contract or to an absolute refusal of future performance.

The account in respect of which the sum of Rs. 2,000 was due was not confined to dealings under the contract, but even if it had been confined to dealings under the contract, the authorities, above referred to, support the view that the failure by the plaintiffs to pay for the goods which had at first been delivered on credit was not a renunciation of the contract or such a refusal as would excuse performance of the contract on the part of defendant.

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- (1) (1909) *I. L. R. 36 Cal. 617* (*Coorjee Bhoja v. Rajendra Nath*).
 (2) (1906) *I. L. R. 33 Cal. 477* (F.B.) (*Rash Behary v. Nrittya Gopal*).
 (3) (1871) *L. R. 9 C. P. 208* (*Freeth v. Burr*).
 (4) (1878) *I. L. R. 4 Cal. 252* (*Sooltan Chand v. Schiller*).
 (5) (1886) *I. L. R. 9 Mad. 359* (*Simson v. Virayya*).

In our opinion it must be held that the defendant rescinded the contract without legal justification and the appeal must be allowed. At the same time we consider that the dispute and litigation is due to plaintiff's unreasonable conduct in withholding the notes and that costs of the appeal should not be awarded.

We accept the appeal and, setting aside the lower Court's decree dismissing the suit on the preliminary finding, we remand the case under order XLI. rule 23, Civil Procedure Code, for decision on the merits after assessment of the damages, if any, suffered by the plaintiffs.

Except as regards Court fees, which will be refunded, each party will pay its own costs of this appeal.

Appeal accepted

No. 64.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Beadon.*

THE SECRETARY OF STATE FOR INDIA—(DEFENDANT)—
APPELLANT.

Versus

HAKIM AND OTHERS—(PLAINTIFFS)—RESPONDENTS

Civil Appeal No. 276 of 1913.

Land Acquisition Act, 1 of 1894, sections 18 and 19—provisions in regard to reference to Court must be strictly observed—time limit—extension of—minority.

On 7th June 1912 the Collector made his award. On 11th July 1912 the respondents presented a vague petition on unstamped paper which was returned as being unstamped and not specifying the field areas. On 23rd July Hakim, respondent, presented a written objection asking the Collector to review his award and grant him further compensation. This was rejected as time-barred and so was a subsequent petition filed by Hakim on 3rd August 1912. On 14th August 1912 Gainda, respondent, applied to the Collector practically for a review of his award which was rejected as time-barred. No further application, after the rejection of the unstamped petition of 11th July, was apparently made on behalf of the minor respondents Miran Bakhsh and Allah Ditta.

The Collector after rejecting the aforesaid petitions however ordered that they should be sent to the Divisional Court to be put up with other connected cases before him. The Divisional Court apparently regarded this order as a reference under sections 18 and 19 of the Land Acquisition Act, and acted on it,

Held, that the procedure prescribed in sections 18 and 19 must be strictly observed and that the Divisional Court had not jurisdiction to deal with the respondents' objections to the Collector's award—

- (1) because there was no application by any of the respondents asking the Collector to take action under section 18 of the Act,
- (2) because the petitions made to the Collector were time-barred,
- (3) because the Collector rejected the petitions and did not refer them under section 19 to the Divisional Judge, and
- 4 as regards the minor respondents, because there was no application at all before the Collector.

I. L. R. 30 Bom. 275 (285) (1) referred to.

Held also, that the objection as to the jurisdiction of the Divisional Judge could be taken at any time.

Held further, that the period of limitation laid down in section 18 of the Act cannot be extended on the ground of minority.

First appeal from the decree of B. H Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated the 12th November 1912.

Government Advocate, for appellant.

Umar Bakhsh, for respondents.

The judgment of the Court was delivered by—

7th Jan'y 1914.

RATTIGAN, J.—A return has now been made to this Court's order of remand, dated 12th May 1913, but the learned Government Advocate has filed certain additional grounds of appeal taking exception to the jurisdiction of the Divisional Judge to adjudicate upon the claims of the present respondents. These grounds were filed subsequently to the date of the said return, and it is admitted that they were not urged in the Court of the Divisional Judge when the latter was originally adjudicating upon the respondents' case. They were also not urged before this Court at the last hearing, but Mr. Petman contends that they go to the root of the case and as they show that the learned Judge had no jurisdiction to entertain and determine the claims put forward by the respondents, they can be raised even at the eleventh hour.

The authority cited by him (*I. L. R. 30 Bom. 275 (285) (1)*), certainly supports his contention and the reasoning of the learned Judge (Chanda Varkar, J.) who decided that case, appears to us to be conclusive. The question, then, is whether in the present case the Divisional

(1) (1905) *I. L. R. 30 Bom. 275 (285)* (*In the matter of Government and Nanu Kothare*).

Judge had jurisdiction to deal with the case of the present respondents Hakim, Gainda, Miran Bakhsh and Allah Ditta.

It appears that the award of the Collector was made on the 7th June 1912, and that on the 11th July 1912 a somewhat vague petition, on unstamped paper, was presented to the Collector by all the respondents. This petition was returned to the petitioners on the ground that it could not be entertained as it was unstamped and did not specify the field areas to which it related. On the 23rd July 1912 Hakim, acting for himself, presented a written objection to the award, but in it he merely asked the Collector to review his award and grant him further compensation. The Collector rejected this application as time-barred and in his order, dated 26th July 1912, observed that Hakim was present at the time when the award was announced.

On the 3rd August 1912 Hakim filed another petition before the Collector, but this was also rejected on the same grounds.

On the 14th August 1912 Gainda, on his own behalf, applied to the Collector, practically for a review of his award, and urged that his petition was in time as he had no notice of the award, until the 25th June, when notice of it was served upon him. This application was also rejected as time-barred, and rightly so, for even upon the petitioners' own admission, he had notice of the award on the 25th June and consequently more than 6 weeks had elapsed when he presented his petition on the 14th August. The respondents Miran Bakhsh and Allah Ditta (so far as we can gather from the record before us) made no application to the Collector after the rejection of the unstamped petition of the 11th June. They are said to be minors, but their mother had been acting as their guardian, and under section 18 of the Act, no extension of time is allowable on the ground of minority.

Most unfortunately for all parties concerned, the Collector after rejecting the various petitions made to him, appears to have directed that the applications should be forwarded to the Court of the Divisional Judge, "to be put up with the cases before him."

The Divisional Judge's office apparently regarded this order of the Collector as a reference under sections 18 and 19 of the Act, with the result that this case was placed before the learned Judge as an order of reference duly

made by the Collector. Obviously this was an error, and as matters stood, the Divisional Judge had no jurisdiction to deal with the case of the respondents.

In the first place, there was no application by any of the respondents asking the Collector to take action under section 18 of the Act. The petitions of Hakim and Gainda (other objections apart) merely prayed the Collector to revise his award and to grant them further compensation.

In the next place, these petitions were time-barred and neither the Collector nor the Divisional Judge was competent to entertain them.

Thirdly, the Collector rejected the petitions and did not refer them under section 19 to the Divisional Judge.

And, lastly, so far as respondents Miran Bakhsh and Allah Ditta are concerned, there was no application at all before the Collector. Their petition of the 11th July had been rejected and thereafter they preferred no further application to the Collector.

In these circumstances we must hold, upon the authority cited, that the Divisional Judge had no jurisdiction to deal with the respondents' objections to the Collector's award, and we have no doubt that he would himself have declined to entertain these objections had he not been misled by the curious procedure adopted by the Collector.

We are ourselves at a loss to understand why that officer, after very rightly rejecting the petitions presented to him, thought fit to forward the same to the Divisional Judge, with orders, in vernacular, which suggested that the petitions were referred in due course of law for the learned Judge's determination. The procedure prescribed by sections 18 and 19 of the Land Acquisition Act, 1894, is laid down in very clear terms and must be strictly observed. We cannot too strongly deprecate a departure from that procedure, and we believe that cases such as the one with which we are now dealing are extremely rare. As a result, however, of the irregularities committed by the Collector and by the Divisional Judge who was apparently himself misled thereby, the present respondents have been put to considerable expense, which might well have been avoided if the Collector had adhered rigidly to the provisions of the Act.

We must accept this appeal, but we think that in the circumstances, the parties should be left to bear their own costs, and we direct accordingly.

Appeal accepted.

No. 65.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and
Hon. Mr. Justice Kensington.*

MELA RAM AND OTHERS—(DEFENDANTS)—
APPELLANTS.

Versus

RALLA RAM—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 808 of 1910.

Indian Contract Act, IX of 1872, section 17—fraud—obtaining ex-parte decree by giving false address of defendant and notice by advertisement which defendant would not see—allegation of fraud in plaint of subsequent suit.

Plaintiff in his amended plaint in November 1909 sued for a declaration that he was proprietor of one of the houses in dispute and for possession of half of the other house and one-third of a shop. It was alleged in this plaint that defendants had fraudulently obtained an *ex parte* decree on 19th June 1905 for possession of half of each of the houses and one-third of the shop against the plaintiff, by concealing the real facts and fraudulently secured execution of the decree in plaintiff's absence and without his knowledge.

It was found as a fact that the address of the plaintiff (the defendant in the previous suit) was falsely given as Calcutta and that at the request of the defendants (then plaintiffs) notice was given in the form of advertisement in the *Englishman* and that this was done with the object of concealing from him the fact that a suit had been filed and to obtain a decree behind his back.

Held, that the *ex-parte* decree was secured by the fraudulent misrepresentation that the method of service adopted would supply the respondent with notice of suit and that this fraud was sufficiently indicated in the plaint.

Also that the appellant's action was clearly fraudulent within the meaning of section 17 of the Contract Act and the respondent was entitled to re-open the issues decided in the previous suit.

I. L. R. 11 Bom. 620 (643) (P. C.) (1), I. L. R. 32 Bom. 255 (2), I. L. R. 21 Cal. 612 (3), and I. L. R. 37 Cal. 197, referred to.

First appeal from the decree of Khan Bahadur Khan Ahmad Shah, Honorary Civil Judge, exercising the powers of a Subordinate Judge, 1st Class, Jullundur, dated the 6th May 1910.

Govind Das, Khem Chand and Gokal Chand, for appellants.

Sheo Narain, for respondent.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—The plaintiff sued, by plaint dated 8th Jany. 1914. the 22nd of June 1909, for a declaration that he was owner

(1) (1887) *I. L. R. 11 Bom. 620 (P. C.) (643) (Abdul Hossein v. Turner).*

(2) (1908) *I. L. R. 32 Bom. 255 (Balaji v. Gangadhar).*

(3) (1894) *I. L. R. 21 Cal. 612 (Mahomed Golab v. Mahomed Sulliman).*

(4) (1909) *I. L. R. 37 Cal. 197 Narsingh Das v. Rafikan).*

and in possession of two houses marked A and B on the plan filed and of two-thirds of a shop and for a declaration that the *ex-parte* decree for possession of half of each of the said houses and one-third of the shop obtained by the defendants against him was void and not binding on him, or for any other relief which the Court might deem proper.

On the 24th of August 1909 the Court held that the defendants were in actual possession of a half share of each of the houses and one-third of the shop and that the plaint should be amended by substituting a claim for possession of those shares. This order was reviewed to the extent that the amendment should be in respect of house A and the shop only. An amended plaint was consequently filed on the 21st November 1909, seeking a declaration that the plaintiff was proprietor in possession of house B and that the defendants had no right to it, and a decree for possession of half house A and one-third of the shop. In this plaint it was alleged that the defendants fraudulently obtained an *ex-parte* decree on the 19th of June 1905 for possession of half of each of the houses and for one-third of the shop against the plaintiff by concealing the real facts and fraudulently secured execution of the decree in plaintiff's absence and without his knowledge.

The Court below has found that the defendants obtained this decree fraudulently in that they represented that there was only one *chaubara* on the roof of house B and concealed the fact that the house was "two-storied, the upper storey consisting of five splendid *chaubaras*." In the Court's opinion the motive for this misrepresentation was to establish the right of one Kanshi Ram, whose heirs the present defendants-appellants claim to be, to half of the lower storey, as they could not hope to prove that he had built the upper storey, and the inference would be that the builder of the upper storey was the owner of the lower storey. The Court below did not lay stress on the fact that a false address had been supplied to the Court in a previous suit as the address of the respondent but the allegations of fraud in the amended plaint are sufficiently wide to cover that fraudulent misrepresentation.

We are satisfied that at the date on which a notice of a previous suit was issued by the Court the respondent was not at Calcutta and that the appellants' objection representing that he was at Calcutta and that notice should go to him in the form of advertisement in the *Englishman* newspaper was to conceal from him the fact that a suit had been filed and to obtain a decree behind his back.

The respondent's wife was admittedly living at Jullundur, where the property was situate, until 1907 and the respondent had an agent and at least one tenant at Jullundur at the time. Both the wife and the tenant occupied part of the premises in suit and the straightforward course would have been to attempt to ascertain from the wife or agent or tenant where the respondent was, and, if the attempt failed, to have substituted service effected by affixing notice to the house occupied by the wife and lately occupied by the respondent. We are not satisfied that the respondent ever sent the appellants or their ancestor any Calcutta address as being his, and it is significant that no attempt was made to serve the respondent through a Calcutta Court at any place in Calcutta.

The pleader for the appellants contended that the course above found to have been adopted by the appellants does not constitute fraud within the terms of section 17 of the Contract Act, and cited *I. L. R. 11 Bom. (P. C.), 620*, at page 643 (1), ; *I. L. R. 32 Bom. 255* (2) ; *I. L. R. 21 Cal. 612* (3) ; and *I. L. R. 37 Cal. 197* (4), for the propositions that the charge of fraud must be substantially proved as laid and that when one kind of fraud is charged another kind of fraud cannot, upon failure of proof, be substituted for it ; that where fraud is set up, particulars of it must be given and it must be based upon a specification of the acts relied upon as constituting fraud ; that the respondent had to prove that he had been prevented by the fraud of the appellants from placing his defence to the claim before the Court, and that even if the respondent was really unaware of the suit and the decree and execution proceedings were all behind his back, failure to serve summons was not sufficient ground for relief in this suit, but that, he must prove that the decree was obtained by fraud.

These authorities do not, in our view of the facts established by the evidence on the record, help the appellants. As above stated the decree was secured by fraudulent misrepresentation that the method of service adopted would supply the respondent with notice of suit and this fraud was sufficiently indicated in the plaint. The appellants' action was clearly fraudulent within the terms of section 17 of the Contract Act and the respondent was entitled to re-open the issues decided in the previous suit.

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- (1) (1887) *I. L. R. 11 Bom. 620* (643), (P. C.) (*Abdul Hossein v. Turner*).
 - (2) (1908) *I. L. R. 32 Bom. 255* (*Balaji v. Gangadhar*).
 - (3) (1894) *I. L. R. 21 Cal. 612* (*Mahomed Golab v. Mahomed Sulliman*).
 - (4) (1909) *I. L. R. 37 Cal. 197* (*Narsingh Das v. Rajikan*).

Our finding on the question of fraud obviates the necessity of considering the second issue framed by the Court below. On the third issue we have no hesitation in holding on the evidence on the record, that the respondent was owner of the whole of the houses in suit, Kanshi Ram having at his death no title to those houses and that the respondent is entitled to the decree for possession of one-third of the shop in suit which he has obtained below.

The pleader for the appellants laid considerable stress on a judgment of this Court in Further Appeal No. 337 of 1901 between the same parties, and on certain proceedings connected with the redemption of a mortgage in respondent's favour. The mortgage was of agricultural land, and it and the proceedings in respect of it had nothing to do with the subject-matter of the present suit. So much of the judgment in Appeal No. 337 of 1901 as laid down a general rule of succession under Hindu Law was *obiter dictum*, inasmuch as it had already been admitted in that suit that the respondent was heir to half the property of Kanshi Ram. Copi Ram, the ancestor of the appellants, had in our opinion no title to the property decreed by the Court below to the respondent. The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 66.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Chervis.

DAYA RAM AND GOBIND RAM—(DEFENDANTS)—
APPELLANTS.

Versus

CHUNDAR BHAN AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 936 of 1911.

Accounts—settled and balance struck—not objected to for years—cannot be re-opened.

Plaintiffs to whom, on a partition of the family property, the debt due to the family by defendants 1 and 2 had fallen, sued the latter for recovery of the amount due as per balance Rs. 5,500 struck in May 1905 in the family account books and signed by the defendants, the words *bhul chuk* equivalent to "errors and omissions excepted" were written under the balance. This balance was struck on dissolution of a joint business which the family had been carrying on with defendants 1 and 2. Neither of the defendants had made any attempt up to date of institution of this suit in July 1910 to have these accounts overhauled or corrected. In signing the balance defendant 1 signed a sort

of memorandum in which he admitted that Rs. 5,500 was due to the plaintiffs, promised to pay in 4 instalments within a year, promised interest and agreed that the debts and outstandings of the business were to be paid and realized respectively by defendants 1 and 2. Further, each partly executed a sort of deed of release in favour of the other on the same date and in this the words *bhul chuk* did not occur.

Held that in the circumstances of the case the defendants 1 and 2 could not be allowed to go behind the settlement of 1905.

I. L. R. 32 Bom. 353 (1) and 5 Moo. I. A. 372 (395) (P.C.) (2), referred to.

First appeal from the decree of Sheikh Rukan-ud-Din, District Judge, Montgomery, dated the 30th June 1911.

Lajpat Rai and Gokal Chand for appellants.

Sheo Narain for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—The following pedigree-table shows the relationships *inter se* of the three plaintiffs and of defendants 3 to 5. They belong to the *Arora* tribe, as also do defendants 1 and 2. 8th Jany. 1914

RATTAN CHAND (dead).

Jawala Ram, defendant 3.

Chandar Bhan
plaintiff 1.

Ram Chand,
defendant 4.

Karam Chand,
defendant 5.

Mukand Lal. Sant Ram.
Minor plaintiffs 2 and 3.

This was a joint Hindu family until 8th August 1908, when under an arbitration award (Exhibit D 24, page 67 paper book,) of which we shall hear more later the family broke up, plaintiffs remaining joint *inter se* and defendants 3 to 5 also *inter se*.

In the month of Maghar Sambat 1961=November-December 1904, the family entered into a commission agency business with defendants 1 and 2, each group having half share; and this business lasted until 18th Jeth Sambat 1962 = 31st May 1905, on which day there was drawn up in the *bahi* of the family a statement of account (Exhibit P. 1.) between the family and defendants 1 and 2, translation of which will be found at pages 9-14 of the paper book. This showed total debits against

(1) (1908) *I. L. R. 32 Bom. 353* (*Magniram Khupchand v. Lazminarayan*).

(2) (1853) *5 Moo. I. A. 372 (395) (P. C.)* (*McKellar v. Wallace*).

defendants 1 and 2 of Rs. 9,675 odd, a total credit of Rs 4,175 odd, and a balance of Rs. 5,500 duly signed by Daya Ram, defendant 1, on the same day. Defendant 2 was not there, but he signed some days later ; and neither of the two seems to have made any attempt thereafter up to the date of the institution of this suit in July 1910 to have those accounts overhauled or corrected, though in striking and admitting the balance the not unusual phrase *bhul chuk* is used which corresponds to the English trader's " errors and omissions excepted."

Plaintiffs' claim, then, is based on this sum of Rs. 5,500. They admit a sub-sequent payment of Rs 500 by defendants 1 and 2 (see exhibit P. II. page 14) and to the Rs. 5,000 thus remaining they add Rs. 2,591 interest, the rate having been stated in the balance of 31st May 1905 as 8 annas *per cent. per mensem* for the first year and Re. 1 *per cent. per mensem* thereafter. The plaint gives some details both as to the nature of the items making up the sum of Rs. 9,675 aforesaid, and of those making up the sum of Rs. 4,175 ; but we need not go into this, as we are going to hold that defendants 1 and 2 cannot in all the circumstances go behind the balance of 31st May 1905 aforesaid.

Defendants 1 and 2 in their written pleas (pages 71, 72) first demur to some of the figures in exhibit P. I. with the aim of reducing the liability of Rs 5,500 as at 31st May 1905, and also allege subsequent payments by themselves aggregating (inclusive of the Rs. 500 admitted by plaintiffs) Rs 4,855 (excluding fractions). They also give rather vague reasons for urging that in reality some Rs. 3,000 is due to them, and they object to paying interest.

Upon these pleadings the natural issues were framed, and some four months later the Court, going behind the balance of 31st May 1905 and allowing interest as above, awarded to plaintiffs a decree for Rs. 5,419 and full costs against defendants 1 and 2.

These defendants have appealed, and plaintiffs have filed cross-objections, asking for the sum of Rs. 2,172 which has been reduced from their claim

We have heard the case argued at great length, a large number of the items in exhibit P. I. having been discussed as well as the general question whether defendants 1 and 2 can properly be allowed to go behind the

settlement of 31st May 1905. That question we answer in the negative.

The principle laid down in *I. L. R. 32 Bom. 353* (1) and in the Privy Council ruling therein cited (2), seems to us fully applicable; and here there are very special circumstances and incidents which make the said principle peculiarly apposite.

Defendant 1 had before him on 31st May 1905, at the time of the winding up of the business, a very clear and simple account (exhibit P. I.). In signing the balance defendant 1 signed a sort of memorandum of which he must have fully understood the contents, in which he admitted that Rs. 5,500 was due to the plaintiffs, promised to pay in four instalments within a year, promised interest as aforesaid and agreed that the debts and outstandings of the business were to be paid and realized respectively by defendants 1 and 2. This sort of adjustment would hardly have been made in such detail then, if it had been contemplated that extensive revision of the account, such as defendants 1 and 2 now claim should be had, was to be made later. Further, each party executed a sort of deed of release in favour of the other on the same day (see exhibit P. 5, page 3, and exhibit D., 15, page 39) and in this the words "*bhul chuk*" do not occur. Finally, as already said, defendants 1 and 2 never thereafter moved plaintiffs again to go into the account, (exhibit P. I.)

[The remainder of the judgment is not required for the purposes of this report—ED.]

Appeal accepted.

No. 67.

Before Hon. Mr. Justice Rattigan and Hon. Mr.

Justice Beadon.

MUNI LAL AND OTHERS—(PLAINTIFFS)—APPELLANTS.

Versus

CHATTER SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 677 of 1910.

Mortgage—result of non-payment of full consideration—where mortgagee states that he has received consideration prior to date of mortgage.

Held, that the principle laid down in 59 *P. R. 1907 (F. B.)* (1), does not apply to a case where the mortgagor states that he has received consideration

(1) (1908) *I. L. R. 32 Bom. 353* (*Magniram Khupchand v. Laxminarayan*).

(2) (1853) 5 *Moo. I. A.* 372 (395) (*P.C.*) (*McKellar v. Wallace*).

(3) 59 *P. R. 1907 (F. B.)* (*Gokal Chand v. Rahman*).

at a time prior to the mortgage, whereas in point of fact payment of the full sum or receipt of full consideration has not been made or taken place, but only applies to cases where the mortgagee at the time of the mortgage undertakes to pay, or to do something for, the mortgagor *after* the date of execution of the mortgage and fails to carry out his undertaking.

192 P. L. R. 1912 (1), referred to.

Further appeal from the decree of Rai Sahib Lala Narayan Das Ahluwalia, Divisional Judge, Hissar Division, dated the 21st March 1910.

Lajpat Rai, for appellants.

Man Singh, respondent, in person.

The judgment of the Court was delivered by—

8th Jany. 1914.

RATTIGAN, J.—The Courts below concur in finding that the two items, Rs. 500 and Rs. 800, of the alleged consideration money for the mortgage sued upon were fictitious and never paid to the mortgagor. As a result of this finding, which we ourselves have no hesitation in accepting as correct, the Divisional Judge without considering the other points involved in the case and relying upon No. 59 P. R. 1907 (F. B.) (2), has dismissed plaintiff's suit with costs.

The learned Divisional Judge in applying the Full Bench ruling to the facts found by him has overlooked the distinction pointed out in 192 P. L. R. 1912 (1), between cases where the mortgagor states that he has actually been paid or received consideration at a time prior to the mortgage, whereas, in point of fact, payment of the full sum or receipt of full consideration has not been made or taken place, and cases where the mortgagee at the time of mortgage undertakes to pay, or to do something for, the mortgagor *after* the date of execution of the mortgage and fails to carry out his undertaking. The Full Bench ruling applies to the latter and not to the former class of cases.

We must accordingly hold that the Divisional Judge erred in dismissing the suit on the preliminary ground that the Full Bench ruling applied to it. We accordingly accept this appeal and under Order XLJ, rule 23, Civil Procedure Code, we remand the case to the Divisional Judge for determination of the appeal before him in accordance with law.

Appeal accepted.

(1) 192 P. L. R. 1912 (*Yakub Khan v. Raghpat Rai*).

(2) 59 P. R. 1907 (F. B.) (*Tokal Chand v. Rahman*).

No. 68.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Beadon.

SULTAN SINGH AND OTHERS—(OBJECTORS)—
APPELLANTS.

Versus

BADHAWA SINGH, OFFICIAL LIQUIDATOR,
LAXMI COMPANY, LTD.—RESPONDENT.

Civil Appeals Nos. 243 and 244 of 1913.

Indian Companies Act, VI of 1882, section 169—appeals—which lie to Divisional Court and which to Chief Court—limitation—extension of time for notice to respondent—appellant must act with diligence.

The orders of the District Judge declaring appellants to be contributaries were passed on the 16th January 1913, the appellants in appeal No. 244 applied for a copy on the 17th January and obtained it the same day and their appeal to the Chief Court was filed on the 5th February.

The appellants in appeal No. 243 did not apply for a copy of the order till the 28th January and they filed their appeal on the 4th February.

Held, that an appeal under section 169 of the Companies Act of 1882, lies to the Divisional Court unless the value exceeds five thousand rupees.

31 P. R. 1913 (1), referred to.

Held also, that in neither appeal was there any reasonable prospect of notice of appeal being served on the respondents within three weeks of the passing of the order complained of, and, as in point of fact, such notice did not reach the respondent within that period, the appeals were barred by time, extension of time being only admissible when the appellant can show that he himself has been duly diligent.

95 P. R. 1908 (2), 176 P. L. R. 1911 (3), 19 Mad. L. J. 511 (4), and 13 Bom. L. J. 528 (5), referred to.

Miscellaneous first appeal from the decree of A. D. C. Barnes, Esquire, District Judge, Ambala, dated 16th January 1913.

Sundar Das for appellants.

Sheo Narain for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—Mr. Sheo Narain for the respondent, Official Liquidator, raises the preliminary objection that under No. 34 P. R. 1913 (1), the appeals in these cases lie to

12th Jany. 1914.

(1) 34 P. R. 1913 (*Busheshar Nath v. Kanhaya Lal*).

(2) 95 P. R. 1908 (*Daulat Ram v. The Woollen Mills Compy.*)

(3) 176 P. L. R. 1911 (*Hira Lal v. Himlaya Glass Works Co.*).

(4) (1908) 19 Mad. L. J. 511 (*East India Distilleries and Sugar Factories v. Tinnevely Sarangapani Sugar Mills Co.*)

(5) (1911) 13 Bom. L. R. 558 (*In re Lakhmidas Khimji Spinning and Weaving Coy. Ltd. (in liquidation)*).

the Divisional Judge. The amount in respect of which the appellants are respectively liable as contributaries is in appeal No. 243 the sum of Rs 900 due from Jagan Nath and Rs. 1,875 due from Khuswakat Rai and in appeal No. 244 the sum of Rs. 3,750 due from Sultan Singh and Rs. 2,500 due from Basheshar Nath Ram Saran Das. In the circumstances, a first appeal would lie to this Court in Appeal No. 244, and not in Appeal No. 243.

As we considered it advisable that both appeals should be heard at the same time, we decided to transfer the latter to this Court in exercise of our power of transferring cases and appeals, and also of the powers given under section 151, Civil Procedure Code, we accordingly proceeded to hear the appeals.

Mr. Sheo Narain then urged that under section 169 of the Indian Companies Act, the appeal could not be heard, inasmuch as notice thereof had not been given within three weeks after the order complained of had been made and that there was no ground in the present instance for granting an extension of time.

The order of the District Judge was passed on the 16th January 1913 and the appellants in appeal No. 244 applied for a copy on the 17th of January and received such copy the same day. The appellants in appeal No. 243 did not apply for a copy of the order until the 28th of January. The appeal No. 243 was filed in this Court on the 4th February and the appeal No. 244 on the 5th of February 1913. There was thus no reasonable prospect of notice of the appeal being served on the respondent within three weeks of the passing of the order complained of and, in point of fact, such notice did not reach the respondent within that period.

The authorities cited by Mr. Sheo Narain (*viz.*, No. 95 P. R. 1908 (1), 176 P. L R. 1911 (2), 19 *Mad. L. J.* p. 511, (3), and 13, *Bom. L. R.* 558 (4)), fully support his contention that an extension of time should not be allowed by the Court unless the appellant can show that he himself has been duly diligent and that any delay which has occurred has been due to the respondent's

(1) 95 P. R. 1908 (*Daulat Ram v. The Woollen Mills Company*).

(2) 176 P. L R. 1911 (*Hira Lal v. Himalaya Glass Works Co.*).

(3) (1908) 19 *Mad. L. J.* 511 (*East India Distilleries and Sugar Factories v. Tinnevely Sarangapani Sugar Mills Co.*).

(4) (1911) 13 *Bom. L. R.* 558 (*In re Lakhmidas Khimji Spinning and Weaving Coy. Ltd. (in liquidation)*).

conduct or to some action or inaction on the part of the Court.

In the present case Mr. Sundar Das was unable to give us any ground which would justify our granting an extension of time. In our opinion in cases of this kind an appellant who desires to contest an order passed under the Companies Act must act with promptitude and satisfy the Court that he has himself done everything to comply with the strict provisions of section 169 of the Act.

The appellants in the present cases have failed to show such promptitude and the result is that we must dismiss both appeals, as we hereby do, with costs.

Appeals dismissed.

No. 69.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Beadon.*

WEST—(OBJECTOR)—APPELLANT

Versus

BANI PARSHAD AND OBEIDULLA, OFFICIAL
LIQUIDATORS, INDUSTRIAL EAST, LIMITED—
RESPONDENTS.

Civil Appeal No. 1060 of 1912.

Companies—winding up—contributories—contract for taking shares induced by fraud—avoidance of contract in winding up proceedings.

Held, that a shareholder who has made no attempt to avoid his contract for taking shares before the date when application was made to the Court for the compulsory winding up of the company cannot be relieved from his liability as a contributory in the winding up proceedings on the ground that he was induced to enter into the contract by fraud.

7 E. and B. 356 (1) and 1 Ch. 365, referred to, also Buckley's Companies Act (1902), p. 130, and the Laws of England, Vol. V, p. 131.

First appeal from the order of Rai Bahadur Lalu Mool Raj, District Judge, Lahore, dated the 18th June 1912.

Oertel, for appellant.

Respondents, in person.

The judgment of the Court was delivered by—

RATTIGAN. J.—

* * *

* 22nd Jan. 1914.

Furthermore, it is admitted that appellant made no attempt to avoid his contract before the date when

(1) 7 E. and B. 356 (*Henderson v. Royal British Bank*).

(2) (1900) 1 Ch. 365 (*In re General Railway Syndicate*) (*Whiteley's Case*).

*[Only portion of the judgment, required for this report, has been printed—ED.]

Mr. Birrel applied for the compulsory winding up of the Company, and, in the circumstances, it is now too late for him to plead that he was deceived into taking shares. As observed in Buckley's work on the Companies Act (1902), "If before it (a voidable contract) be rescinded a winding-up be commenced or the concern cease to be a going concern, the shareholder can no longer be relieved, but will be liable as a contributory." (Page 130).

In the words of Lord Campbell, L. C., in *Henderson v. Royal British Bank* (7, E. and B., 356), (1), "It would be monstrous to say that he having become a partner and a shareholder and having held himself out to the world as such and having so remained until the concern stopped payment, could, by repudiating the shares on the ground that he had been defrauded, make himself no longer a shareholder, and thus get rid of his liability to the creditors of the Bank who had given credit to it on the faith that he was a shareholder."

To the same effect is the rule as stated in Volume V of the "Laws of England" (page 151):—"The right to rescind is also lost by the commencement of the winding up of the Company or by the Company becoming insolvent and stopping payment unless in either case the shareholder has previously repudiated the shares and proceedings for rescission have been commenced by him or some other person and he has in the latter case agreed with the Company to be bound by such proceeding, or has previously repudiated and filed an affidavit setting up the misrepresentation in resisting a summary application for judgment in an action for calls."

The last proposition is based on the case of *In re General Railway Syndicate (Whiteley's Case)* (1900), 1, Ch. 365 where the facts were peculiar. The Company had applied under Order XIV of the Rules of the Supreme Court for leave to sign final judgment in an action for calls and leave to defend was obtained by a shareholder upon an affidavit stating his intention to counter-claim for rescission of the contract to take shares on the ground of misrepresentation. This was, it is to be noted, an action by the Company itself and Lindley, M. R. in more places than one in the course of his judgment, is careful to point out that at the time when the applicant sought to rescind his contract with the Company, no petition to wind up the

(1) 7 E. and B. 356 (*Henderson v. Royal British Bank*).

(2) (1900) 1, Ch. 365 (*In re General Railway Syndicate (Whiteley's case)*).

Company had been presented, and consequently no equities had arisen affecting third parties

Mr. Oertel, however, argued that the delay on the part of his client in repudiating his shares was due to a promise made to him by Mr. Enever, the Managing Director of the Company, who, in his letter, dated "Calcutta, 1st February 1910," (Exhibit F) wrote to appellant as follows :—

"I will see what you have paid up and arrange to give you fully paid up shares for the same and transfer your liabilities on the remaining shares."

Admittedly Mr. Enever did not carry out this promise which was purely personal on his part and in no way binding on the Company. The promise might possibly have been a good ground, as against the Company itself, for any *reasonable* delay on the part of the appellant in repudiating his shares. It could not, however, even as against the Company, justify his inaction for over seven months, and it affords no excuse whatever when his rights came into competition with those of creditors of the Company after a petition for winding up has been duly presented to the Court.

We hold, therefore, that the first and second grounds upon which appellant disclaims liability have no force, and must be overruled.

The third ground is to the effect that as the shares of appellant were pledged to the Company, it is the Company, and not the appellant who is liable thereon. For this proposition no authority was cited and it is clearly untenable. The shares were, no doubt, hypothecated with the Company, but the legal owner thereof was the appellant and as such he, and he alone, must be held liable for all unpaid calls thereon.

The fourth ground, *viz.*, that before appellant can be held liable the directors of the Company should first be called upon to liquidate the demands of the Company's creditors—was not pressed and very rightly so. The proposition is startling in its novelty and the learned Counsel for appellant was unable to adduce any authority in its support.

The appeal fails and is dismissed. The official liquidators are pleaders, but they have appeared as respondents in their capacity as such and we cannot therefore allow them costs.

Appeal dismissed.

No. 70.

*Before Hon. Mr. Justice Johnstone and Hon. Mr.
Justice Chevis.*

DEV RAJ AND ANOTHER—(DEFENDANTS)—
APPELLANTS

Versus

SHIV RAM—(PLAINTIFF)—AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 202 of 1911.

Indian Limitation Act, IX of 1908, articles 120, 125, and 126—suit by son for a declaration that mortgage of a house made by his father and the widow of his father's brother shall not affect his reversionary rights—limitation.

Plaintiff sued in February 1910 for a declaration that the mortgage-deed of a house, dated 4th April 1898, for Rs. 1,400 made by defendant 1, his father, and defendant 2, the widow of his father's brother, in favour of defendants 3 and 4 will not affect his reversionary rights—defendants 3 and 4, *inter alia*, pleaded limitation. The first Court found that the suit was within time under article 125 of the Limitation Act, in regard to defendant 2's alienation and under article 126 in regard to defendant 1's alienation, but finding the other issues in favour of defendants dismissed plaintiff's claim. Plaintiff appealed to the Divisional Court and here the question of limitation was not again raised by the defendants-respondents and the Court finding the other issues in plaintiff's favour decreed the suit. The defendants-mortgagees appealed to the Chief Court.

Held, that article 125, of the Limitation Act, was not applicable, as it applies only to *land* and comes in only when the suit is by the *first* reversioner.

Held also, that article 126 was inapplicable as that only applies to suits "to set aside" a father's alienation and not to declaratory suits.

I. L. R. 13 Cal. 308 (P. C.), distinguished.

Held consequently, that the Court must fall back on article 120.

*Further appeal from the decree of L. H. Leslie-Jones, Esquire,
Divisional Judge, Jullundur Division, dated the 22nd December
1910.*

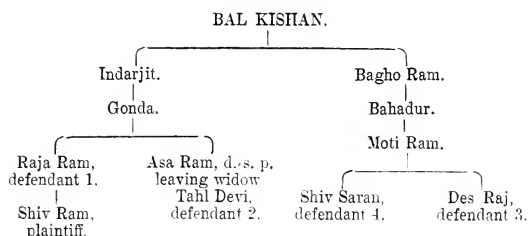
Sheo Narain, for appellant.

Muhammad Shafi, for respondents.

(1) (1886) *I. L. R. 13 Cal. 308 (P. C.)* (*Jagadamba Chaudhrani v. Dakhina Mohun Ray*).

The order of the Court was delivered by—

JOHNSTONE, J.—The pedigree of this family, in so far as we require it for this case, is as follows :—



On 4th April 1898 a mortgage-deed was executed whereby the house in suit was mortgaged by defendants 1 and 2 to defendants 3 and 4 for Rs. 1,400 paid in cash at time of registration.

Plaintiff sued for a declaration that this mortgage, being without consideration and “necessity” should not affect his reversionary rights. This suit was instituted on 25th February 1910, *ie.*, some 9 years 11 months after the date of the mortgage; but in his plaint Shiv Ram puts the date of accrual of cause of action at about a month before institution of suit, it being alleged that then the defendants finally refused to recognise plaintiff’s claim.

Defendants 3 and 4 pleaded limitation. They also urged that defendant 1’s consent to defendant 2’s alienation of her share barred plaintiff’s claim as to that share; that the house was not ancestral, *qua* plaintiff; that plaintiff could not object to alienations made by his own father; that plaintiff acquiesced in the alienation; and that in any case the alienation was for consideration and “necessity.”

The first Court drew issues, and proceeded to dispose in favour of plaintiff of the issue as to limitation by applying article 125 of the Schedule to defendant 2’s alienation and article 126 to that by defendant 1. It then found that the father (defendant 1), being manager of the joint family, plaintiff had no power to sue and have the alienation set aside as having been made for unlawful purposes, apparently assuming without discussion that the loan was for family purposes.

This was sufficient for disposal of the case; but the Court went on to hold that the house was not proved ancestral, *qua*

plaintiff, that defendant 1's consent validates defendant 2's alienation as against plaintiff, that the alienation was for consideration and "necessity," and not for immoral purposes, and that the plaintiff had acquiesced in the mortgage.

Shiv Ram appealed to the Divisional Court, which noted that the respondents had not again raised the question of limitation, which had been correctly decided below. It then went on to find that the house was ancestral, and that plaintiff and defendant 1 are joint, and quoted 53 *P. R.* 1901 (*F. B.*) (1), as authority for holding that, though consideration passed, and though it is not shewn that the money was borrowed for immoral purposes, yet as "necessity" is not shewn, plaintiff must have his decree, which, however, will not prevent the mortgagee-defendants from prosecuting any remedies they may have against defendant 1 and the property. That Court also held that defendant 1's consent to defendant 2's alienation could not affect plaintiff's right to object, and that it was not proved that plaintiff had ever acquiesced in the alienations.

The mortgagee-defendants have now filed this further appeal and we have heard arguments and have arrived at certain conclusions, which we may summarise thus :—

(i) The contention now urged for the first time that defendant 2 has daughters and their sons alive, who, as heirs, would under Hindu Law be preferred to plaintiff, is taken too late and cannot be heard now ; ground of appeal I (d).

(ii) Grounds II (d) and (f) have not been argued before us and must be taken as given up.

(iii) Respondents' counsel's argument, that defendant 2 having under Hindu Law no share in the family property, the alienation should be looked upon as entirely defendant 1's alienation, is overruled.

The lower appellate Court has found that Raja Ram, defendant 1, and Asa Ram were not joint ; and the presumption (not rebutted) from the acts of the parties and the pleadings is against the idea of their jointness. We find that it is not proved that defendant 2's late husband was one of a joint Hindu family with defendant 1, and thus the contention fails.

(iv) Leaving out of account for the moment a new point of view, to be noticed later, suggested by plaintiff's counsel, we find that this suit would be barred by time. The Articles of the Limitation Schedule that come in for discussion are Nos.

125, 126 and 120. The first two allow twelve years from the occurrence of certain events and the third six years only; and we are of opinion that the third alone applied to the facts of the present case.

Article 125 runs thus :—

Suit during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her remarriage.

Twelve years. The date of the alienation.

It does not apply because it covers only suits for land, and farther it comes in only when the suit is by the first reversioner. Here the suit is not for land, and defendant 1 is the first reversioner, not the plaintiff. We may note that counsel on both sides are agreed that article 125 cannot be invoked in this case.

Article 126 runs thus :—

By a Hindu governed by the law of the *Mitakshara* to set aside his father's alienation of ancestral property.

Twelve years. When the alienee takes possession of the property.

Mr. Shafi contends that this article does cover defendant 1's alienation because the suit is by a Hindu governed by the *Mitakshara* Law and is directed against his father's alienation of property. He argues that the words "set aside" include a suit for a declaration that the alienation objected to should not affect plaintiff's rights after the death of the alienor, and in support of the contention he quotes the Privy Council ruling in *I. L. R., XIII Cal., 308, (1)*. That ruling is concerned with a suit against an adoption.

In the limitation law then in force article 129 corresponds to article 118 of the present law, and the phrase in the older law was "to set aside" an adoption. At pages 319, 320 of the report their Lordships said in effect that the phrase was not precise or exact and they gave reasons for holding that it should be taken as including a suit to have an adoption declared invalid.

No doubt in consequence of that ruling, the Legislature in the later law amended the phraseology and for "to set aside

(1) (1886) *I. L. R.* 13 Cal 308 (P. C.) (*Jagadamba Chaudhrani v. Dakshina Mohun Roy.*)

an adoption " substituted " to obtain a declaration that an alleged adoption is invalid. or never, in fact, took place." But it left unaltered the phrase " set aside " in articles 13, 14, 15, 44, 91, and 126 ; and as regards article 126, we cannot but take it that this was done advisedly.

The Legislature, as it were, conceded that in article 129 (now 118) the wording required amendment, but at the same time decided that in article 126 and the five other articles named above the phrase " set aside " in its strict meaning should stand ; and it seems to us clear that to ask for a thing to be " set aside " implies a prayer for immediate relief, and not for a mere declaration that on the happening of a future contingency, of which the plaintiff may not be alive to take advantage, certain results will follow.

As neither article 125 nor article 126 applies, we have to fall back on article 120, and clearly, if plaintiff has to rely on this alone, his suit is too late. But plaintiff urges further that he came of age at the age of 18 less than three years before suit, and thus should have the benefit of section 6 with section 8 of the Limitation Act.

[The rest of the judgment is not required for this report. The case was remanded for trial of the point stated in the last sentence.—ED.]

Case remanded.

No. 71.

*Before Hon. Mr. Justice Johnstone and Hon. Mr.
Justice Chevis.*

MUSSAMMAT BHAG BHARI AND OTHERS—(DEFENDANTS)
—APPELLANTS

Versus

JAWAHIR SINGH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 910 of 1911.

*Indian Court Fees Act, VII of 1870, section 7 V, clauses (b) and (e)—
valuation of suit for land covered by a garden.*

Held, that a suit for possession of land forming a garden and two houses must be valued under section 7 V (e) of the Court-Fees Act, according to the market value of the garden and houses, notwithstanding that the land under the garden is assessed to land revenue, and this valuation holds good equally for the purpose of jurisdiction.

100 P. L. R. 1904 (1), and C. A. 929 of 1910 (unpublished), referred to.

¹ 100 P. L. R. 1904 (*Fateh Singh v. Chetu*).

Further appeal from the decree of P. L. Barker, Esquire. Additional Divisional Judge, Jhelum Division, at Rawalpindi, dated the 1st June 1911.

Oertel and Badr-ud-Din, for appellants.

Nanak Chand, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—In this suit for 16 *kanals* of land, forming a garden and 2 houses, the first Court gave plaintiffs a decree for possession on payment of Rs. 999 with half costs. The lower appellate Court on appeal by defendants, with cross-objections by plaintiffs, reduced the amount payable by the latter to Rs. 699. 28th Jan. 1914

Defendants have filed this further appeal under the old law, and have been met at the outset by Mr. Nanak Chand (for plaintiffs-respondents) with the objection that no appeal lies, because—

- (i) the value of the land at thirty times *jama* being Rs. 234-6-0, and the value of the houses (in their original state) Rs. 130-8-0, and with the additional value allowed by the lower appellate Court Rs. 730-8-0, the suit, *qua* "land suit," has a value below Rs. 250 and *qua* unclassified suit, a value under Rs. 1,000 (*i.e.*, Rs. 964-14-0. *Cf.* 100 *P. L. R.* 1904 (1) and Civil Appeal No. 929 of 1910 ;
- (ii) the decree of the lower appellate Court has varied the decree of the first Court otherwise than as to costs and therefore the Rs. 250 or Rs. 1,000 is the critical value according as the suit is treated as a land suit or an unclassified suit under section 40, Punjab Courts Act, as it stood before amendment by Punjab Act, I of 1912.

Mr. Oertel, however, has had no difficulty in repelling this objection. The land here is a "garden," though assessed to land revenue. It was called a garden in the first Court without objection, and it was valued at Rs. 1,074 as a garden by the Local Commissioner. In short, the valuation for Court-fee is governed by section 7 V (e), Court-fees Act, and is not to be arrived at either for Court-fee or in ascertaining jurisdiction by the artificial thirty times *jama* rule. We hold that the appeal lies.

[The remainder of the judgment is not required for the purpose of this report.—ED.]

No. 72.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice
Scott-Smith.*

LAL KHAN AND OTHERS—(PLAINTIFFS)—APPELLANTS
Versus
NURA AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 170 of 1912.

*Custom—Alienation—Awans—Tallagang tahsil—sale by proprietor with
sons living—Riwaj-i-am, Jhelum District.*

Held, that customary law recognises a distinction between the powers of alienation of a *sonless* proprietor and those of a proprietor who has sons, and that it had not been proved that among Awans of the Tallagang tahsil a proprietor who has sons has unlimited power to deal with ancestral property as he pleases.

88 P. R. 1911 (1), 114 P. R. 1913 (2), 8 P. R. 1906 (3), 5 P. R. 1914 (4), 81 P. R. 1894 (5) and C. A. 446 of 1911 (unpublished), referred to.

Further appeal from the decree of E. A. Estcourt, Esquire, Divisional Judge, Attock Division, at Campbellpore, dated the 24th July 1911.

Shah Nawaz, for appellants.

Badr-ud-Din, for respondent.

The judgment of the Court was delivered by—

12th Feby. 1914.

RATTIGAN, J.—On the 20th February 1908, one Nura, Awan of the Tallagang tahsil, which was formerly a part of the Jhelum District but is now included in the district of Attock, sold his ancestral land for a consideration of Rs. 1,250 in favour of Shera and others.

The present suit was instituted on the 12th of August 1910, and in it the sons of Nura pray for a declaration that the sale in question will be ineffective as against their rights upon the death of the vendor. Of the consideration money Rs. 891 are alleged to have been paid to previous mortgagees and the balance of Rs. 359 is said to have been paid in cash at home.

The first Court held that the sale, as such, was not binding upon the plaintiffs, but that necessity in respect of the Rs. 891 had been duly established and accordingly granted a declaration to the effect that plaintiffs would be entitled to

(1) 88 P. R. 1911 (*Khuda Bakhsh v. Waham Ali*).

(2) 114 P. R. 1913 (*Khuda Bakhsh v. Ahmad Khan*).

(3) 8 P. R. 1906 (*Khudayar v. Fatteh*).

(4) 5 P. R. 1914 (*Yakub Khan v. Fateh Khan*).

(5) 81 P. R. 1894 (*Rasul Khan v. Mussamat Mastur Bano*).

possession of the land, on the death of their father, upon payment of that sum.

Both parties appealed to the Divisional Judge, who was apparently of opinion that the sum paid to the prior mortgagees was duly established and was for necessity and further that the balance was also actually paid. The learned Judge, however, gave no definite finding upon these points, inasmuch as he held that the vendor had practically unlimited powers of alienation and could not be controlled in respect of their exercise by his sons. He accordingly dismissed the plaintiffs' suit with costs throughout.

The latter have preferred a further appeal to this Court and we have heard the case argued by Mr. Shah Nawaz for them and by Mr. Badr-ud-Din Kureshi, for respondent.

In our opinion there can be no doubt that the prior mortgagees were duly paid off to the extent of Rs. 891 and the alienation in favour of defendants is, to that extent, valid and binding upon the plaintiffs.

As regards the balance, it is possible that some sum of money was paid to the vendor in order to induce him to consent to the sale, but there is absolutely no proof of "necessity" in respect of any amount so received by him. Upon this finding, if the sale is to be upheld, it will be necessary for us to agree with the finding of the Divisional Judge, that by custom among Awans of the Tallagang *tahsil*, a proprietor who has sons, has nevertheless absolute power of disposing of ancestral property. Obviously the *onus* of establishing so unusual a custom must lie heavily upon the defendants.

In the present case, all that the latter have been able to show is that a number of alienations have taken place within recent years and have not been contested, but the particulars and details of these alienations have not been disclosed. Evidence of this kind is of but little value and inconclusive.

Defendants' counsel has further referred to a large number of authorities in which it has been held by this Court that a sonless, or a childless, proprietor has among Awans of the Tallagang, Mianwali, Khushab, Shahpur, Jullundur and Pindi *tahsils* very extensive, if not indeed unlimited powers of alienation.

In one case, No. 88 *P. R.* 1911 (1), a Single Bench of this Court did, no doubt, hold that the plaintiff had failed to prove

that among Awans of Tallagang *tahsil*, a proprietor is incompetent to make an alienation of his ancestral property in the presence of the son. That case has been discussed and explained in No. 114 *P. R.* 1913 (1), and it is unnecessary for us to say more than that it is not clear whether the son there referred to was born before the alienation in question took place.

The authorities relied upon by the learned Judge do not themselves support the proposition that a proprietor, with sons, has unlimited power to deal with the property as he pleases.

In No. 8 *P. R.* 1906 (2), which was also a case from this *tahsil*, the gift by the proprietor was contested by a nephew but had received the assent of the proprietor's own son; clearly this is not an authority upon which the vendees can rely for purposes of the present case.

The Customary Law of the Jhelum District by Mr. Talbot prepared in 1901 is not very satisfactory so far as the answers given by Awans to questions 89, 90 and 105 are concerned. But considered generally, those answers would suggest that even a sonless proprietor is incompetent to alienate ancestral property without the consent of reversioners related to him within the 4th degree (see as to this No. 5 *P. R.* 1914) (3).

No. 81 *P. R.* 1894 (4) and No. 114 *P. R.* 1913 (1), are, however, direct authorities in support of the plaintiffs' contention that their father was not competent to deal with the land as he pleased.

In a recent case in which the parties were Pathans of the Mianwali *tahsil*, this present bench found that the *Riwaj-i-am* of that *tahsil* (which applies equally to Awans and Pathans) makes a clear distinction between cases where an alienation is by a proprietor who has sons, and cases where it is by a sonless proprietor (see Civil Appeal 446 of 1911).

We ourselves are satisfied that custom does recognise this distinction and that even those tribes who concede very extensive rights to proprietors in present possession, differentiate between the powers of a proprietor who has and a proprietor who has not sons living at the time of the alienation.

(1) 114 *P. R.* 1913 (*Khuda Bakhsh v. Ahmad Khan*).

(2) 8 *P. R.* 1906 (*Khudayar v. Fatteh*).

(3) 5 *P. R.* 1914 (*Yakub Khan v. Fateh Khan*).

(4) 81 *P. R.* 1894 (*Rasul Khan v. Mussammat Mastur Bano*).

In the present case no instance has been cited in which it has been definitely found that amongst Awans of this *tahsil* a proprietor can sell or dispose of his property to the prejudice of his sons unless, of course, the alienation is for necessary purposes.

We, accordingly, accept this appeal and, reversing the decree of the Divisional Judge, we restore that of the Munsif.

Appeal accepted.

No. 73.

*Before Hon. Mr. Alfred Kensington, Kt., Chief Judge,
and Hon. Mr. Justice Rattigan.*

PEOPLE'S BANK OF INDIA, LTD., AND OTHERS—
(APPELLANTS).

Versus

NARAIN DAS AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 2460 of 1913.

Companies—resolution of company for voluntary winding up brought to notice of Court while application for compulsory winding up was pending—locus standi of liquidators appointed by company to appeal against order for compulsory winding up.

After a petition had been presented by certain creditors for the winding up by the Court of the People's Bank and the 14th November 1913 had been fixed for the hearing of the said petition a meeting of the shareholders was held on 9th November 1913 and a resolution passed to the effect that the company should go into voluntary liquidation and that the present appellants should act as liquidators. This resolution was brought to the notice of the District Judge on the 14th November by an application addressed to him by the appellants which was placed on the record and the District Judge with this before him and after full consideration of the facts decided to direct a *compulsory* winding up by liquidators appointed by him. The liquidators appointed by the company appealed against this order.

Held, that they had no *locus standi* to appeal against the District Judge's order for compulsory winding up.

*Miscellaneous first appeal from the order of H. F. Forbes, Esquire,
District Judge, Lahore, dated the 17th November 1913.*

Gobind Ram, for appellants.

Petman, Parker and Gulshan Rai, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—After a petition had been presented by 19th Jan'y. 1914. certain creditors to the District Judge of Lahore for the winding up by the Court of the People's Bank, Limited, and the 14th November 1913 had been fixed for the hearing of

the said petition, a meeting of the share-holders of the company was held on the 9th November and a resolution passed to the effect that the company should go into voluntary liquidation, subject to the supervision of the Court, and that the present appellants should act as liquidators.

We are informed that this resolution was brought to the notice of the District Judge on the said 14th November by an application addressed to him by appellants, but that the only order passed thereon was in vernacular and was to the effect that the application was to be filed on the record. Apparently no further action in the matter was taken by appellants, but the District Judge after full consideration of the facts and with the said resolution of the company before him decided to direct a compulsory winding up by liquidators appointed by him. From that order appeals have been filed not only by the present appellants, but also by the directors of the company and certain depositors.

* * * * *

Mr. Gobind Ram was unable to cite any authority in support of his client's right to challenge the order of the District Judge.

At the time when the appellants were appointed liquidators by the resolution of the company, the question whether the company was to be wound-up compulsorily was *sub judice*, and though it might well have been open to appellants, as representing the wishes of the majority at the meeting when they were appointed, to apply to the District Judge to give effect to the resolution in question, we cannot accept the proposition that they had any further *locus standi* when the Court decided to direct a compulsory winding-up of the company. Once that order was passed, the only persons competent, in our opinion, to appeal therefrom were the company itself or such share-holders or creditors as felt aggrieved by it.

The case might possibly have been different had the appellants been appointed liquidators *ante litem motam*. That is a question upon which, as it does not arise before us, we give no opinion. But we hold that appellants whose appointment was made *pendente lite*, have no right to contest the order from which they are appealing; and we, therefore, dismiss this appeal with costs.

* * * * *

Appeal dismissed.

No. 74.

*Before Hon. Mr. Justice Johnstone and Hon. Mr.
Justice Chevis.*

RAHIM BAKHSH—(PLAINTIFF)—APPELLANT

Versus

MUSSAMMAT BUDHAN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 636 of 1911.

*Custom—alienation—Sahgal Khatri—Jullundur City—converts to
Muhammadanism—oral gift of property to wife—Muhammadan law.*

Mussammat B., the widow of one A. S., a Sahgal Khatri of Jullundur City, gifted a house to the *Anjuman Hamayat-i-Islam*. The plaintiffs, collaterals of A. S., sued for a declaration that the gift should not affect their reversionary rights. The house was part of the property of A. S. and was included in an oral gift by the latter to his wife.

Held that Sahgal Khatri who have been living for a long time in the city of Ludhiana and have changed their religion and are dependent mainly on service and not on agriculture for their livelihood, even if not following Muhammadan Law strictly in matters of inheritance, cannot be presumed to follow agricultural custom whereby a proprietor cannot alienate ancestral land except for necessity, and that the plaintiffs had failed to prove that A. S. could not deal with his property at his will.

*Further appeal from the decree of L. H. Leslie-Jones, Esquire, C. S.,
Divisional Judge, Jullundur Division, dated the 8th May 1911.*

Beechey and Badr-ud-Din, for appellant.

Muhammad Shafi, Ahsanul Haq and Fazl-i-Husain, for respondents.

The judgment of the Court was delivered by—

CHEVIS, J.—The genealogical tree is given on page 4 of 21th Jany. 1914. the paper book. Mussammat Budhan, widow of Ahmad Shah, having given a house to the *Anjuman Hamayat-i-Islam*, the plaintiffs, collaterals of Ahmad Shah, sue for a declaration that the gift shall not affect their reversionary rights. The lower Courts having dismissed the suit, plaintiffs have lodged this further appeal. The defence is that Ahmad Shah gifted all his immovable property to his wife, partly in payment of dower and partly as a free gift, that the house in question was included in the gift, that Mussammat Budhan became full owner under the gift and can deal with the gifted property as she likes.

The plaintiffs deny that any such gift was made by Ahmad Shah; they also plead that the donee was not put in possession and so the gift was incomplete. They plead further

that Ahmad Shah was incompetent to make such a gift, and that the gift, if made, does not include the house in question.

Other pleas concern the question whether the property is ancestral or not, but unless we hold that Ahmad Shah could not gift ancestral property to his wife it will be unnecessary to go into the question of the house being ancestral.

The first question we will consider is whether the parties are governed by ordinary agricultural custom as regards alienation.

The parties are Sahgal Khattris, converts from Hinduism, living in Jullundur City. Originally, it appears, the family came from two villages, Tallan and Damodarpur, situated some 9 or 10 miles from Jullundur, but how long ago they migrated is quite unknown, and all that can be said is that it must have been a very long time ago, and there is no presumption whatever that they are to-day governed by the same customs as the inhabitants of these two villages. They have long been living in a town, and have changed their religion; further, it is impossible to say what customs prevailed in the two villages at the time when this family migrated.

That the Jullundur Sahgals do not follow Muhammadan Law in all respects may well be true, *e.g.*, it is said that daughters do not inherit; but they are not an agricultural tribe, they reside in a town, they appear to be dependent mainly on service and not on agriculture for their livelihood, and so there is no presumption whatever in favour of general custom, and the mere fact that they do not follow Muhammadan Law in matters of inheritance is no proof that they follow the general agricultural custom whereby a proprietor cannot alienate ancestral land except for necessity. So the *onus* lies on the plaintiffs of proving that Ahmad Shah could not deal with the property at his will.

The plaintiffs rely on the five cases of which details are given on pages 10 and 11 of the paper book. Of these, case No. 2 relates to Rallan Sheikhs of Dasuya, No. 3 to Bahl Sheikhs of Chaurasia, Hoshiarpur District, and No. 5 to Sahgals of Damodarpur, and we fail to see how these cases can affect the question of what custom is followed by Sahgal Sheikhs of Jullundur City. Moreover cases 1 and 2 were settled by compromise, case 3 related to *waqf* property, and case 4 was merely a case of a daughter's claiming succession. These cases, in our opinion, do not help the plaintiffs in the least, and we must hold that plaintiffs have failed to prove that

in matters of alienation they are governed by custom. It is unnecessary therefore to examine the instances produced by the defendants.

We find that plaintiffs have failed to prove that custom applies.

[The rest of the judgment is not required for the purpose of this report. — Ed.]

Appeal dismissed.

No. 75.

*Before Hon. Mr. Justice Rattigan and Hon Mr. Justice
Scott-Smith.*

LALJI DAS—(PLAINTIFF)—APPELLANT.

Versus

CHET RAM AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 650 of 1911.

Indian Registration Act, III of 1877, section 17 (b)—deed limiting a widow's power of alienating immovable property—registration—Guardian and Wards Act, VIII of 1890, sections 29, 30 and 31—sale by guardian without Court's permission—status of creditors to object.

One J. G. died leaving a good many liabilities and considerable assets. Shortly after his death his widow, as guardian of her minor sons, entered into an agreement with her husband's creditors. Two lists A. and B. were prepared and annexed to the agreement—list A was a list of the creditors and B. of J. G.'s property, movable and immovable, and one clause of the agreement provided that the widow should not dispose of or alienate any of the property in list B. until the debts in list A. were paid off.

Subsequently the widow applied for and was appointed guardian to her minor sons under the provisions of Act VIII of 1890, and after that sold some of the property to one C. R., her brother-in-law.

Held, that the agreement between the widow and the creditors required registration as it purported to limit her right in immovable property and the sale to C. R. was consequently not invalid by reason of the agreement.

Held also, that the creditors of J. G. could not, under section 30 of the Guardian and Wards Act, object to the sale (which had been accepted by the adult son of J. G.), merely on the ground that it was not authorized by the Court.

Held further, that as there were apparently sufficient assets, after omitting the property in dispute, to meet the debts due from J. G. there could be no presumption of bad faith made against C. R. even if he bought the property for something less than its value.

Further appeal from the decree of Major A. A. Irvine, Divisional Judge, Lahore Division, dated the 10th December 1911.

Lajpat Rai and Bhagwan Das, for appellant.

Shadi Lal, Parker, Jowala Parshad and Ram Bhaj Datta,
for respondents.

The judgment of the Court was delivered by—
16th Feby. 1914. SCOTT-SMITH, J.—This order disposes of Civil Appeals Nos. 650, 651 and 652.

Briefly, the facts of these cases are as follows :—

The plaintiffs-appellants in execution of their decrees passed against the estate of Jai Gopal, deceased, got the houses in dispute attached. Chet Ram, defendant-respondent, filed objections on the strength of a deed of sale executed in his favour, prior to the passing of the decrees, by Mussammat Puran Devi, defendant No. 4, as guardian of her, then minor, sons, defendants Nos. 2 and 3. The executing Court released the property from attachment and the plaintiffs then filed regular suits.

The first Court held that the sale was fictitious and without consideration, and was effected in fraud of the creditors, and gave plaintiffs decrees accordingly.

The Divisional Judge after a remand for further enquiry held it to be proved that all the assets realized by Mussammat Puran Devi had been satisfactorily accounted for and that therefore there were no good grounds for holding that the sale to Chet Ram was collusive or without consideration. He accordingly dismissed the suits.

The plaintiffs have filed further appeals to this Court and the appeals have been argued before us at very great length. Every item of the accounts has been exhaustively dealt with and learned legal arguments have been addressed to us. We do not find it necessary to deal with the accounts or with the arguments in detail for in the view we take of the cases they can be very simply and briefly disposed of.

Jai Gopal died on 18th April 1903 leaving a good many liabilities and considerable assets. On 27th May 1903 an agreement was come to between his widow, Mussammat Puran Devi, as guardian of her minor sons and the creditors. Two lists A and B were prepared and annexed to the agreement. List A is one of the creditors and their debts, the total of the latter being Rs. 29,600. B is a list of Jai Gopal's property, movable and immovable, and one clause of the agreement provided that Mussammat Puran Devi should not dispose of or alienate any of the property in list B until the debts in list A were paid off. Another clause provided that no interest should be chargeable on the debts if they were paid off to the extent of Rs. 12,000 in six months.

The sale to Chet Ram took place on 26th November 1903 and the consideration entered in the deed is Rs. 5,000.

The agreement of 27th May 1903 is unregistered. The Divisional Judge has held that it required registration since it purported to limit Mussammat Puran Devi's rights to dispose of immovable property.

We have no doubt that his decision on this point is correct and that the deed required registration so far as it purported to limit her rights in immovable property. It can no doubt be used for other purposes, but, being unregistered it, cannot be held to affect any immovable property named therein. The sale to Chet Ram is therefore not invalid by reason of the agreement.

On 30th June 1903 Mussammat Puran Devi applied to the District Judge to be appointed guardian of her minor sons under the provisions of Act VIII of 1890 and on 15th August 1903 she was appointed. It is contended that thereafter she had no authority to sell any of the minors' property without the previous sanction of the Court and that therefore the sale to Chet Ram was illegal.

Section 30 of the Act runs as follows :—

“A disposal of immovable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby.”

Mr. Sheo Narain contended that the words “any other person” would include creditors who might be injuriously affected by a transfer of property.

We are not able to accept this contention. The Act is designed to safeguard the interests of minors and the restrictions on the powers of guardians are also in their interests. Section 31 lays down the principles on which permission to the guardian should be granted; clause (1) lays down that permission shall not be granted except in case of necessity or for an evident advantage to the ward. Clause (4) provides that before granting permission the Court may give notice to any relative or friend of the ward who should, in its opinion, receive notice. Nothing is anywhere said about giving notice to creditors of the ward, and we do not think a creditor can object to a sale like this, which has been accepted by the non-adult son of Jai Gopal, merely on the ground that it was not authorized by the Court.

When Mussammat Puran Devi applied to be appointed guardian she filed with her application a list of the minors' property. It was as follows :—

	Value.
	Rs.
1. Land situate in Gujranwala District joint with Hira Nand and Kahn Chand ...	30,000
2. House in Garhi Shahu	4,000
3. Shop 2½ storied	5,000
4. Stable and shop	3,000
5. Half a house	3,000
6. Engine in Railway Godown	2,000
7. Furniture and wood	2,000
8. Coal and iron material	2,000
9. Debts due from various persons ...	19,307
Total ...	70,307

Items 3, 4 and 5 are the houses now in dispute and a great deal of stress has been laid on the fact that whereas in this list their value is given as Rs. 11,000 they were sold to Chet Ram for Rs. 5,000.

A pre-emption suit was brought on account of the land item No. 1, and the pre-emptors had to pay only some Rs. 7,000, and only half of this sum was due to Jai Gopal. It is quite possible that it was supposed when the list was prepared that the land was worth a good deal more than Rs. 7,000, but for our present purpose we take the latter figure as approximately correct.

The house referred to as item No. 2 was subsequently sold for Rs. 2,700.

The engine was sold for Rs. 2,000.

Item No. 7 is included in No. 4 of the list of income printed at page 13 of the paper book, the *ahata* is the same item being item No. 2 of this list.

It appears, therefore, that only Rs. 714 was realized on account of item No. 7 instead of Rs. 2,000.

Item No. 8 is included in item No. 2 on page 13 of the paper book and is said to have realized only Rs. 269.

Out of item No. 9, Rs. 9,300 were admittedly realized.

We therefore arrive at the following value of assets actually realized or said by appellants to have been realizable:—

		Rs.
No. 1	...	3,500
„ 2	...	2,700
Nos. 3 to 5	...	11,000
No. 6	...	2,000
„ 7	...	714
„ 8	...	269
„ 9	...	9,300
		<hr/>
		29,483

But though only Rs. 9,300 was realized on account of outstandings, we see no reason to doubt that much more was really due to the estate. The first Court in its report of the 4th July 1910 calculates the amount of outstanding debts to be Rs. 14,285—see page 12 of the paper book, and in addition to this Rs. 4,500 was due on some deed of mortgage. At the lowest estimate it would thus appear that the widow had good grounds for supposing that the value of her deceased husband's assets was some Rs. 39,000, and she may well have supposed it to be a good deal more. At the time when she made the agreement with the creditors the estate does not at all appear to have been a bankrupt estate, and we cannot accept the contention of appellants' counsel that her execution of the agreement, which appears to have been forced upon her, was an act of insolvency.

Omitting the property in dispute there were apparently sufficient assets to meet the debts due from Jai Gopal and we do not, therefore, consider that any presumption of bad faith can be made against Chet Ram, even if he bought the property for somewhat less than its value.

We are not satisfied that he paid much less than the market value. Being brother-in-law of Mussammatt Puran Devi he probably made a good bargain for himself, but this of itself is not a sufficient indication of bad faith. It must be remembered that he succeeded in the objection case, and that, therefore, the *onus* of proving that the sale was a fraudulent one was upon the plaintiffs. We think the first Court somewhat lost sight of this fact.

We hold then, having regard to the value of the assets available at the time of the sale, that there can be no pre-

sumption of bad faith either on the part of the transferrer or transferee, and that there is no evidence that the sale was effected in order to defeat and delay the creditors.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

No. 76.

*Before Hon. Sir Alfred Kensington, Kt., Chief Judge,
and Hon. Mr. Justice Rattigan.*

BUDAL *alias* BADLU—(PLAINTIFF)—APPELLANT

Versus

KIRPA RAM AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 146 of 1911.

Custom - alienation - powers of agricultural proprietors, Rohtak district.

Held, that it had not been proved that by custom agricultural proprietors in the Rohtak district can dispose at pleasure of their ancestral land.

Further appeal from the decree of Khan Bahadur Pirzada Maulvi Muhammad Hussain, Divisional Judge, Hissar Division, dated the 10th November 1910.

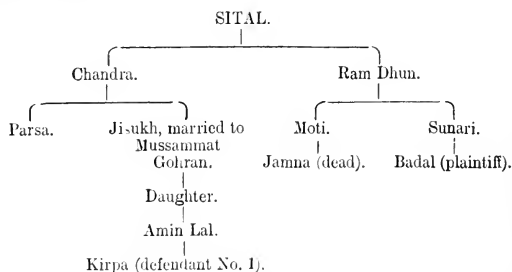
Lajpat Rai, for appellant.

Fazal Elahi, Ram Bhaj Dat and Balwant Rai, for respondents.

The judgment of the Court was delivered by—

4th March 1914.

RATTIGAN, J.—The following pedigree-table will help to an understanding of the facts :—



The property in dispute originally belonged to one Jisukh who died many years ago leaving a widow, Mussammatt Gohran. Upon the death of the latter, mutation of names took place in favour of Amin Lal, the daughter's son of Jisukh. This was in 1866. An objection was raised by Jamna (since deceased)

and present plaintiff, Badal, but their objection was overruled, partly on the ground that they had no *locus standi* in the presence of Jisukh's brother, Parsa, who was alive and consented to the mutation, and partly on the ground that Jisukh and Mussamat Gohran had, during their lives, practically gifted the property to their daughter's son in return for the services rendered by him to them.

Amin Lal died many years ago, and plaintiff Badal alleges that upon his death he (plaintiff) took possession of the property and has been in adverse possession ever since. This allegation has been found against him by both Courts, but there is no doubt that the plaintiff had been in possession for some four or five years prior to suit.

On the 17th of April 1909, Kirpa, defendant No. 1, the son of Amin Lal, sold the property to defendants Nos. 2 to 5 by a registered deed for Rs. 5,000, the whole of which sum is said to have been paid in cash before the Sub-Registrar.

Plaintiff sues for a declaration that the sale in question is invalid as against him. The District Judge granted plaintiff the relief sought, but the Divisional Judge on appeal has dismissed the suit on the grounds—(1) that in the Rohtak District, proprietors have unlimited power of alienation and that plaintiff had failed to prove any custom whereby Kirpa was precluded from making the alienation now impeached and (2) that plaintiff had failed to prove adverse possession for over 12 years.

Plaintiff has appealed to this Court, but we did not think it necessary to call upon his counsel to address us in the first instance as we cannot accept the bold proposition laid down, apparently without any authority in support of it by the Divisional Judge that in the Rohtak District agricultural proprietors can do as they please with their ancestral land.

The *onus* of proving so exceptional a custom was necessarily upon the defendants, but Mr. Ram Bhaj Dat on their behalf was not able to cite any authority in support of the Divisional Judge's statement, except one or two passages from the note by Pandit Mabaraj Kishen, printed at page 173 of Tupper's Customary Law, Volume II. This note, according to Mr. Purser who supplied it to the compiler of the volume, "cannot be relied upon in doubtful points," and we note that para. 24 is not easily reconcilable with para. 27. We cannot accept this note as a sufficient authority in support of the wide proposition that Kirpa had, by custom, full power to deal with the property as he pleased.

The defendants have not attempted to show, or even indeed to plead, either in the District Court or in their grounds of appeal to the Divisional Judge, that there was any necessity for the sale. All that they urge is that full consideration passed and that the money was duly paid in the presence of the Sub-Registrar. That may have been the case, but we cannot assume without any evidence that Kirpa had any necessity to raise Rs. 5,000 in cash by the sale of the property which is, without doubt, ancestral as regards plaintiff, who is a collateral of the original owner, Jisukh, in the third degree.

We, accordingly, accept this appeal with costs throughout and grant plaintiff the decree which he seeks.

Appeal accepted.

No. 77.

*Before Hon. Sir Alfred Kensington, Kt., Chief Judge, and
Hon. Mr. Justice Rattigan.*

MUSSAMMAT KISHEN DEVI AND ANOTHER—
(PLAINTIFFS)—APPELLANTS

Versus

SHIB SARAN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 925 of 1911.

Hindu Law—Brahmans of Mauza Jadla. Nawashahr tahsil, Jullundur District—succession—daughter's daughters or paternal grand-nephews.

One J. S. originally acquired the land in suit, he died about the year 1881. After his death the land passed in the ordinary way to his widow H. D. and at settlement of 1885 when a *Muafi* which had been held by J. S. was resumed, the settlement appeared to have been made with the widow, who was in possession. On 30th August 1903 the widow made a gift of the land to her daughter K. Ruldu, the brother's son of J. S., brought a suit to contest the gift but failed on the ground that he had no *locus standi* as the donee was under Hindu Law, the next heir. K. had a son A. C. who died in his mother's life-time leaving a widow R. She also had three daughters K. D., P. D. and B. D. and on her death, mutation was effected in the name of her son's widow, R. This lady subsequently gifted the land to R. L., the son of her husband's sister B. D. This gift gave rise to a suit by the sons of Ruldu, but a compromise was effected between them and Ruldu by which they shared the land in certain proportions. The two other sisters of A. C. then brought the present suit against the sons of Ruldu and Rup Lal for possession of two-thirds of the land originally acquired by J. S.

Held, that whether the property was acquired or ancestral H. D.'s possession would be merely that of a widow and she could not by any act of donation on her part confer on the next heir, her daughter K., any greater or

more extensive rights than she herself possessed. K. was under Hindu Law the heir of her father J. S. but she could not when succeeding as such heir to her father form the stock of a fresh descent and Ruldu's sons (who were *sopindas* of J. S.) would be entitled to succeed in preference to K.'s daughter, who could claim only as *bandhus* of their deceased grandfather.

Further appeal from the decree of Lieutenant-Colonel G. C. Beadon, Divisional Judge, Ambala Division, dated the 11th May 1911.

Sheo Narain, for appellants.

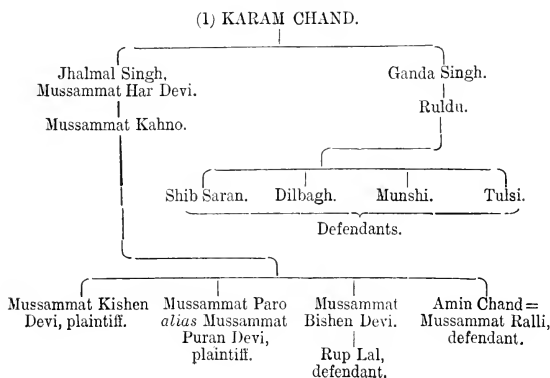
Shadi Lal and Nihal Chand, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—The pedigree table (1) of the parties and 17th March 1914. the facts antecedent to and connected with the present litigation are set forth in the judgment of the Divisional Judge.

Admittedly the parties who are Brahmans of *Mauza Jadla* in the *Nawashahr tahsil*, *Jullundur District*, are governed by Hindu Law, and the property in dispute (some 209 *kanals* of land) was originally acquired by one *Jhalmal Singh* who (as we are informed) died about the year 1881. After his death, the land passed in the ordinary way to his widow, *Mussammat Har Devi*, and at the Settlement of 1885, when a *muafi* which had been held by *Jhalmal Singh* was resumed, the land revenue was assessed presumably at favourable rates and the Settlement appears to have been made with *Mussammat Har Devi* who was then in possession.

On the 30th August 1903 *Mussammat Har Devi* made a gift of the land in favour of her daughter *Mussammat Kahno*, and *Ruldu* (the nephew of *Jhalmal Singh*) brought a suit to



contest the gift, but failed on the ground that he had no *locus standi*, as the donee was, under Hindu Law, the next heir.

Mussammat Kahno had a son Amin Chand, who died in his mother's life-time leaving a widow Mussammat Ralli. She had also three daughters (Mussammat Kishen Devi, Mussammat Puran Devi and Mussammat Bishan Devi) all of whom were alive when she died in 1907, and, on her death, mutation was effected in favour of Mussammat Ralli (the widow of Amin Chand). Mussammat Ralli subsequently made a gift of the land to Rup Lal, the son of her husband's sister, Mussammat Bishan Devi.

This gift gave rise to a suit by the sons of the said Ruldu, but a compromise was effected between the parties, Rup Lal receiving a sum of Rs. 600 and $\frac{5}{13}$ th of the land, the remaining portion of the land going to Ruldu's sons. This compromise was effected on the 23rd July 1909. Rup Lal subsequently sued to set aside the compromise on the ground that it was effected by fraud, but (as later events show, fortunately for himself) his suit was dismissed and he did not appeal.

On the 23rd November 1909, the present plaintiffs, Mussammat Kishan Devi and Mussammat Puran Devi, sued the sons of Ruldu and Rup Lal for possession of two-thirds of the land, originally acquired by Jhalmal Singh. They admitted that Rup Lal, as the son of their sister, Mussammat Bishan Devi (since deceased), was entitled to one-third of the land, but they asserted that the sons of Ruldu had no right to the property inasmuch as Mussammat Kahno had obtained it as a gift from Mussammat Har Devi, and had thereby become absolute owner. As her daughters, plaintiffs contended that their right to succeed was superior to that of Ruldu's sons.

The Subordinate Judge decreed the claim on the ground that as the property had been acquired by Jhalmal Singh, it descended, in the first instance, to his daughter, Mussammat Kahno, and thereafter to Mussammat Kahno's daughters who were her rightful heirs.

From the decree of the Subordinate Judge, Ruldu's sons and Rup Lal both appealed separately to the Divisional Judge, who held :—

(1) that Mussammat Ralli, whose husband had predeceased his mother, Mussammat Kahno, had no right to the land and could therefore make no valid gift of it in favour of Rup Lal ;

(2) that Mussammat Har Devi, who was in possession of the land merely as the widow of Jhalmaal Singh, had no power to alter the devolution of the property by making a gift of it in favour of her daughter Mussammat Kahno ;

(3) that Mussammat Kahno succeeded to the property merely as the heir of her father, and none the less so, because her succession was accelerated by Mussammat Har Devi's surrender of the property to her ;

(4) that as Mussammat Kahno succeeded to the property as the heir of her father she took a restricted estate and could not herself be " the stock of a fresh line of descent ;"

(5) that, consequently, descent must be traced from Jhalmaal Singh, the last male owner of the property ; and

(6) that plaintiffs as daughter's daughters of Jhalmaal Singh were merely *bandhus* and as such not entitled to succeed in the presence of Ruldu's sons who were the paternal great-nephews of Jhalmaal Singh and therefore *sapindas*.

The learned Judge upon these findings accepted the appeals of Ruldu's sons and of Rup Lal and dismissed plaintiff's suit.

The latter have appealed to this Court and in addressing us on their behalf Mr. Sheo Narain frankly admitted that unless he could establish that Mussammat Har Devi's gift to Mussammat Kahno had the effect of making the latter an absolute owner, his client's case must fail.

Realizing this, the learned Advocate contended that Mussammat Har Devi should not be regarded merely as the widow of Jhalmaal Singh. As such she admittedly would have had no power by any act of donation on her part to constitute Mussammat Kahno, her daughter, an absolute proprietor. The argument, therefore, was that Jhalmaal Singh was not an ordinary proprietor of the property in dispute, but was in possession as a *muafidar* with a *status* which was something less than that of a proprietor, but higher than that of an occupancy tenant. After his death the *muafi* was resumed, and the Revenue authorities by settling with his widow, Mussammat Har Devi, practically made a fresh grant of the land to the latter which constituted her a sort of sub-proprietor, or *adnamalik*, the result being that thereafter Mussammat Har Devi held the land, not as the widow of Jhalmaal Singh, but in her own right as a grantee thereof from Government.

Whether upon these allegations it could be held that Mussammat Har Devi (who at the time when the settlement was made with her was unquestionably in possession of the property merely as the widow of her deceased husband) by virtue of the act of the Revenue authorities acquired the property in absolute ownership in her own right and was therefore competent to make a grant of it to her daughter, is a question which does not really arise in the case.

The argument is ingenious but desperate. The facts may, or may not, be as suggested, but we cannot at this stage of the case accept an argument which is opposed to the plaint and pleadings and was not so much as hinted at in the Courts below. The case has hitherto proceeded upon the assumption that Jhalmal Singh was the proprietor of the property in the ordinary sense of the term, and plaintiff's contention has been that as the property was acquired by Jhalmal Singh and in view of Ruldu's failure to have the gift made by Mussammat Har Devi in favour of her daughter, Mussammat Kahno, set aside, the conclusion must be that Mussammat Kahno must be taken to be an absolute owner and as such "a fresh stock of descent."

This position is obviously untenable. Whether the property was acquired or ancestral, Mussammat Har Devi's possession would be merely that of a widow and she could not by any act of donation on her part confer on the next heir, her daughter, Mussammat Kahno, any greater or more extensive rights than she herself possessed. Ruldu's suit failed not because the gift in question constituted Mussammat Kahno an absolute owner, but because it was a gift in favour of the next heir and as such merely amounted to a surrender by the widow of her own life interest.

Mr. Sheo Narain fully realized this and admitted that in the ordinary way Mussammat Kahno was, under Hindu Law, the heir of her father Jhalmal Singh, but that she could not when succeeding as such heir to her father form the stock of a fresh descent and as a result, Ruldu's sons (who were the *sapindas* of Jhalmal Singh) would be entitled to succeed in preference to Mussammat Kahno's daughters who could claim only as *bandhus* of their deceased grandfather.

In order to overcome this difficulty, the learned Advocate was forced to adopt an entirely new line of argument and to contend that Mussammat Har Devi by the action of the Revenue authorities, had been constituted an absolute owner

of the property in her own right and as such could dispose of it as she thought fit. As we have already remarked, this is an aspect of the case which was not even suggested in the lower Courts, but apart from that objection, no authority has been cited before us in support of the proposition.

On the other hand, we have the authority of the "Punjab Settlement Manual" for holding that in a case where a *muafi* is resumed and a Settlement is thereafter made with a particular person, the action of the Settlement authority does not affect or alter the position of the settlee with regard to the property. (Settlement Manual (Dowie), paragraph 183, pages 89-90).

We must take it, therefore, that this is a case of ordinary succession from the last male owner, Jhalmal Singh, and that Mussammat Kahno obtained possession (during the life-time of Jhalmal Singh's widow and by gift from the latter) merely as the heir (*sapinda*) of her deceased father. As such, she had no power to alter the devolution of the estate, after her death, by gift or will, and under the rules of Hindu Law, Ruldu's sons are entitled to succeed to it. They have by the compromise of July 1909, given part of the property to Rup Lal and fortunately for the latter, his suit to set aside that compromise failed.

But apart from this compromise, they would have been entitled to the whole property and consequently plaintiff's suit has been rightly dismissed.

We accordingly dismiss this appeal with costs against Ruldu's sons. Rup Lal who has no better claim than plaintiffs to any part of the property and has been successful in litigation despite his own efforts, should, we think, bear his own costs and we direct accordingly.

Appeal dismissed.

No. 78.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chervis.

GUJJAR—(DEFENDANT)—APPELLANT.

Versus

AULIYA AND OTHERS—(PLAINTIFFS)—AND ABDUL KARIM AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 762 of 1911.

Custom—alienation—validity of transfer of reversionary rights by reversioners to one of their number—effect upon reversionary rights of bringing

a suit for pre-emption—money compensation payable to pre-emptor in possession.

On 18th April 1904 the widow of one Kasu sold her husband's land to her brother's son for Rs. 1,445-8-0. On 7th March 1905 Dula, a collateral of Kasu, sued for a declaration that the sale should not affect his reversionary rights and obtained a decree accordingly. On 15th February 1905 one Ram Singh sued for pre-emption and Gaman, another collateral of Kasu, brought a similar suit. Each pre-emptor obtained a decree for $\frac{1}{2}$ of the land sold, the price of the land being fixed at Rs. 940. Gaman did not pay the money into Court and so his suit stood dismissed. Ram Singh paid the entire amount and obtained possession of the whole land.

On 17th August 1905 all the reversionary heirs of Kasu, including Gaman, executed a deed of release of their reversionary rights in favour of Dula. The widow of Kasu died in August 1909 and in October 1909 Dula sued the vendee from the widow and the sons of Ram Singh for possession of the land, in pleading the other reversionary heirs as *pro forma* defendants. The first Court decreed the suit conditional on payment by plaintiff of Rs. 522 which amount was found to be for legal necessity. On appeal the Divisional Judge varied the decree to one for possession of $\frac{2}{3}$ th of the land in dispute on payment of $\frac{1}{3}$ th of the sum of Rs. 522 holding that Gaman by bringing a suit for pre-emption had admitted the validity of the sale and had therefore no rights left when he joined the other reversioners in the deed of release in favour of Dula and that therefore Dula could not claim to succeed to Gaman's $\frac{1}{3}$ th share. On appeal to Chief Court—

Held, agreeing with the Divisional Court, that by bringing a suit for pre-emption Gaman must be taken to have admitted that the sale was valid, and that consequently he had no rights of inheritance left in the subject-matter of the sale, which he could transfer to Dula by the deed of release, nor had Gaman's sons any rights in the property in dispute at the time of institution of the suit which they could relinquish in favour of Dula.

Held also, that although Ram Singh, father of defendants 2 and 3, had to pay Rs. 940 before obtaining possession as a pre-emptor, the plaintiff in the present suit could not be called upon to pay to them more than Rs. 522 found to have been advanced by the original vendee to the widow for a necessary purpose.

Held further, that the transfer by the other reversioners of their reversionary rights to one of their number, viz. Dula, by the deed of release of 1905 was valid and that consequently the decree of the Divisional Court for possession of $\frac{2}{3}$ th of the land in suit was correct.

66 P. R. 1897 (F. B.) (1), 67 P. R. 1909 (2), I. L. R. 7 All. 353 (3), and 51 P. L. R. 1903 (4), distinguished.

Further appeal from the decree of L. H. Leslie-Jones, Esquire, Divisional Judge, Jullundur, dated the 16th day of March 1911.

Sheo Narain, for appellant.

Fazl i-Hussain, for respondent.

(1) 66 P. R. 1897 (F. B.) (*Tota v. Abdulla Khan*).

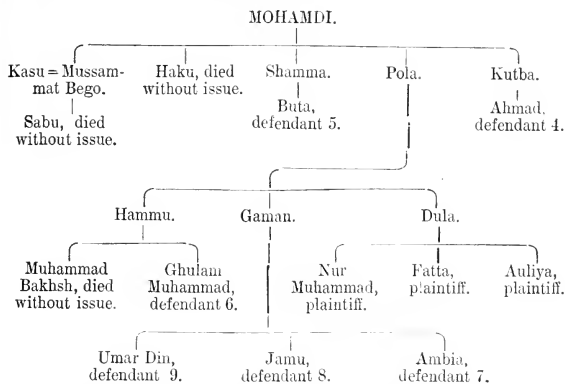
(2) 67 P. R. 1909 (*Jawala Sahai v. Ram Singh*).

(3) (1885) I. L. R. 7 All. 353 (*Azizullah Khan v. Ahmad Ali Khan*).

(4) 51 P. L. R. 1903 (*Basanta v. Indar*).

The judgment of the Court was delivered by—

SHAH DIN, J.—The following pedigree-table will explain 30th March 1914. the relationship of the parties :—



On the 18th April 1904 Mussamat Bego, widow of Kasu, sold the land which had come to her from her husband to her brother's son, Abdul Karim, for Rs. 1,445-8-0. This sale gave rise to 3 suits :—

(1) A suit brought by Dula, son of Pola, on the 7th March 1905, for a declaration that the sale in question shall not affect his reversionary rights. He obtained a decree on the 10th June 1905 on a confession of judgment by Mussamat Bego and the vendee Abdul Karim, the sale being declared wholly void as regards the plaintiff Dulla's rights of reversion.

(2) On the 15th February 1905 Ram Singh, father of defendants Nos. 2 and 3 in the present litigation, sued the vendor and the vendee for pre-emption in respect of the land sold.

(3) Gamun, son of Pola, a reversioner of Mussamat Bego, also brought a similar suit for pre-emption.

Each pre-emptor obtained a decree for half of the land sold on the 15th June 1905, the price of the land being fixed at Rs. 940. Gamun did not pay the money into Court in accordance with the decree and so his suit stood dismissed; the rival pre-emptor, Ram Singh, paid the entire amount and obtained possession of the whole land.

On the 17th August 1905 all the reversionary heirs of Kasu, including Gamun, who, as we have seen, had obtained a decree for pre-emption but had allowed it to lapse, executed a deed of release of their reversionary rights in favour of Dula.

The deed specifies in detail the several shares of the reversioners and goes on to say that since Dula has undergone much trouble and expense in connection with the declaratory suit which he has successfully fought in respect of the sale of the 18th April 1904 by Mussammatt Bego, the executants have relinquished their reversionary rights in Kasu's land in favour of Dula, and, on the death of Mussammatt Bego, Dula shall be entitled to take possession of the land as sole owner thereof.

Mussammatt Bego died in August 1909, and in October 1909 Dula brought the present suit against Abdul Karim, the vendee from the widow, and the sons of Ram Singh, defendants Nos. 2 and 3, for possession of the land left by the widow, at the same time impleading the other reversionary heirs as *pro forma* defendants. Dula, plaintiff, died in November 1909, and his sons were brought on the record as plaintiffs in his place.

The Subordinate Judge decreed the suit conditional on payment by the plaintiffs of Rs. 522, holding that legal necessity for Rs. 522 had been established and that the sale by Mussammatt Bego in 1904 was only valid to the extent of that sum.

On appeal the learned Divisional Judge has held that Gamun, son of Pola, by bringing his suit for pre-emption in respect of Mussammatt Bego's sale of the land in question had admitted the validity of that sale, that he had no rights left in the land at the time when he joined with the other reversioners in executing the deed of release in favour of Dula on the 17th August 1905, and that therefore Dula could not claim to succeed to Gamun's $\frac{1}{4}$ th share of the land in the present litigation. With regard to the remaining $\frac{3}{4}$ th share of the land, the learned Judge was of opinion that Dula's sons were entitled to possession thereof, not on the strength of the deed of release of the 17th August 1905 executed by the other reversionary heirs in favour of Dula, but on the ground that the estate had fallen into possession on the death of the widow, and the said reversionary heirs, who are all parties to the suit, had actually relinquished their own rights in favour of Dula's sons, which is tantamount to a transfer of those rights to the latter. Accordingly, the Divisional Judge passed a decree in favour of the plaintiffs for possession of $\frac{3}{4}$ th share of the land on payment of $\frac{3}{4}$ th of the sum of Rs. 522.

In further appeal by defendant No. 3 his learned advocate has contended—(1) that the sale of the 18th April 1904 was made by the widow for full consideration and legal necessity, and should therefore be upheld; and (2) that in any event the

sons of Dula are not entitled to claim in this suit more than their own $\frac{1}{3}$ th share of the land in their capacity of Kasu's reversioners. On the other hand, the plaintiffs, the sons of Dula, have filed cross-objections urging that the Divisional Judge has erred in disallowing the claim to the extent of $\frac{1}{3}$ th share of the property in dispute.

The plaintiffs' cross-objections can be disposed of in a few words. By bringing a suit for pre-emption in respect of the sale of 1904 by Mussammat Bego, Gamun must be taken to have admitted that that sale was legally valid; and since the pre-emptor, Ram Singh, by reason of his decree of the 15th June 1905, stepped into the shoes of the original vendee, Abdul Karim, Gamun had no rights of inheritance left in the subject-matter of the sale which he could transfer in favour of Dula by the deed of release, dated the 17th August 1905. Apart from the said deed of release, since Gamun's sons, who claim through Gamun, are bound by their father's recognition of the validity of the sale by the widow, they had no rights in the property in dispute at the time of the institution of the suit, and no relinquishment of any alleged rights on their part in favour of Dula's sons can avail the latter.

We, therefore, agree with the Divisional Judge in holding that the suit of the plaintiffs as regards the $\frac{1}{3}$ th share of the land must fail.

We now come to the defendants' appeal. The first contention advanced by the appellant's advocate is clearly untenable and was not seriously pressed by him. Both the Courts below have concurred in holding that legal necessity for the sale by Mussammat Bego existed only to the extent of Rs. 522, the rest of the sale consideration being absolutely fictitious. The soundness of this concurrent finding is not disputed before us; and it follows that although Ram Singh, father of defendants 2 and 3, had to pay Rs. 940 before obtaining possession of the land as a pre-emptor, the plaintiffs in the present suit cannot be called upon to pay to them more than what was advanced by the original vendee, Abdul Karim, to Mussammat Bego for a necessary purpose.

The second contention of the appellant's advocate is that the plaintiffs-respondents are only entitled to claim in this suit their own $\frac{1}{3}$ th share of the land in dispute and not the shares which belong to the other reversionary heirs of Kasu, who have been impleaded as defendants and have not been joined as co-plaintiffs in this litigation. It is contended that

the deed of release, dated the 17th August 1905, cannot be regarded as a deed of transfer of reversionary rights by the executants of that deed in favour of Dula, and that, therefore, it could not confer on Dula any title to the land in suit after it had fallen into possession on the death of Mussammat Bego.

The learned Divisional Judge has held that the deed in question was one of transfer of reversionary rights, but he was of opinion that, according to No. 66 *P. R.* 1897 (*F. B.*) (1), the transfer of reversionary rights by the executants of the deed in favour of Dula was invalid, and, therefore, Dula acquired no rights in the land in suit on the strength of that deed.

The appellant's advocate has conceded that the Full Bench ruling does not apply to a case where some of the reversioners who are entitled to succeed under Customary Law to the estate of a male proprietor on the death of his widow transfer their reversionary rights to another reversioner, and he admits that to that extent the decision of the Divisional Judge against the plaintiffs, so far as their rights are based on the deed of the 17th August 1905, is erroneous.

All that was decided in No. 66 *P. R.* 1897 (*F. B.*) (1) was that among agriculturists governed by Customary Law a reversioner of a deceased male proprietor whose widow is in possession of his estate cannot transfer his reversionary rights to a stranger so as to engraft the latter into the family and thus enable him to contest any alienations made by the widow to the prejudice of her husband's reversioners (see also on this point No. 67 *P. R.* 1909 (2)). The Full Bench ruling is no authority for the proposition that one reversioner of a deceased male proprietor is legally incapable of transferring his rights of succession to another reversioner; and the fundamental principle of the Customary Law which was appealed to in the Full Bench case is in no way violated by such a transfer of the reversionary rights as we are considering in the present case.

The widow, Mussammat Bego, was in possession of the usual life-estate only by way of maintenance, and it is difficult to perceive any reason why the reversioners of her husband who had a present right to succeed to his estate on the widow's death should not have had the power to transfer that right to one of their own number, thereby vesting him with a title to their shares of the estate if and when it should fall into

(1) 66 *P. R.* 1897 (*F. B.*) (*Tota v. Abdulla Khan*).

(2) 67 *P. R.* 1909 (*Jawala Sahar v. Ram Singh*).

possession on the death of the widow. The deed of the 17th August 1905, though it purports to be a deed of relinquishment, is in effect, and must be treated as, a deed of assignment of reversionary rights, and since the assignment was made by some of the reversionary heirs of the husband of Mussammatt Bego in favour of Dula, who was also a reversioner, it was, we consider, a perfectly valid assignment.

I. L. R. VII All. 353 (1), which has been relied upon by the appellant's advocate in support of his argument that the plaintiffs-respondents are not entitled to sue for more than their own $\frac{1}{3}$ th share of the land, is clearly distinguishable from the present case. There the plaintiffs, who were three Muhammadan brothers and who were suing not only for their own shares under the Muhammadan Law but also for the shares of their three sisters, who were impleaded as defendants in the case, relied merely upon the admission of the latter, made in the course of the suit, that their brothers (the plaintiffs) had instituted the suit for the whole estate with their knowledge and permission. The sisters had made no assignment of their rights of inheritance to their brothers prior to the suit being instituted; and it was held that the plaintiffs could not sue for more than their own shares, inasmuch as the sisters could not by an admission or consent of the kind relied on by the plaintiffs in the course of the suit, convey the right or delegate the authority to the plaintiffs to sue for more than their own proper shares in the property.

The decision of this Court in Civil Appeal No. 57 of 1900 (reported as No. 51 *P. L. R.* 1903 (2)) is also not applicable to the circumstances of the present litigation. It was held in that case that the right of succession of collateral heirs to the estate of a Punjab agriculturist is not a single indivisible right, so as to give each collateral a cause of action for the whole, and that, since the share of each heir is capable of exact determination, the true principle is that the right of each plaintiff depends upon his own title, and upon that title alone. It will be observed that in that case the reversioners who had not sued, had made no assignment of their reversionary rights prior to the suit in favour of the reversioner who had sued; and that the claim of all those reversioners was held to have been barred by limitation and by their assent to the adoption of the defendant who was in possession of the property of the last male owner as his adopted son.

(1) (1885) *I. L. R.* 7 *All.* 353 (*Azizullah Khan v. Ahmad Ali Khan*).

(2) 51 *P. L. R.* 1903 (*Basanta v. Indar*).

These facts serve to distinguish that case from the present case, in which the execution of a deed of assignment of reversionary rights by the reversionary heirs who have not sued but who are defendants in the suit, coupled with their admission in the course of the suit that they had already transferred their reversionary rights for valid consideration in favour of the plaintiffs, who are also reversionary heirs of the deceased proprietor themselves, entitles the plaintiffs, in our opinion, to sue for possession of not only their own shares but also of the shares of the said reversioners.

For the reasons given, we maintain the decree of the Divisional Judge and dismiss both the appeal and the cross-objections with costs.

Appeal dismissed.

No. 79.

*Before Hon. Mr. Justice Johnstone and Hon. Mr.
Justice Shadi Lal.*

SHAHAB DIN—(DEFENDANT)—APPELLANT.

Versus

MIRAN BAKHSH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 1340 of 1911.

Civil Procedure Code, 1908, order 41, rule 20—Court's power to add parties—discretionary—not affected by limitation—but not exercised in case of extreme neglect.

Held, that the law of limitation has no application to action taken by the Court under order 41, rule 20 of the Code of Civil Procedure.

I. L. R. 13 All. 78 (1), I. L. R. 11 All. 151 (F. B.) (2), I. L. R. 15 Mad. 362 (F. B.) (3), I. L. R. 33 Cal. 329 (1), (1893) All. W. N. 35 (5), I. L. R. 10 Cal. 445 (6), 8 P. W. R. 1911 (7) and 12 Cal. W. N. 625 (8), referred to.

Held, however, that the power to take action under order 41, rule 20, is discretionary and should not be exercised in a case of extreme neglect.

First appeal from the decree of Lala Kidar Nath, District Judge, Hoshiarpur, dated the 28th August 1911.

Fazl-i-Hussain, for appellant.

Shah Nawaz and Badr-ud-Din, for respondents.

(1) (1889) *I. L. R. 13 All. 78 (Sohna v. Khalak Singh).*

(2) 1892, *I. L. R. 11 All. 151 (F. B.) (Bindeshri Naik v. Ganga Saran Sahu).*

(3) (1892) *I. L. R. 15 Mad. 362 (F. B.) (Kanagappa v. Sakkalanga).*

(4) (1905) *I. L. R. 33 Cal. 329 (Girish Chander v. Sasi Sekharswar).*

(5) (1893) *All. W. N. 35 (Umed Singh v. Dalip).*

(6) (1884) *I. L. R. 10 Cal. 445 (Corporation of the town of Calcutta v. Anderson).*

(7) 8 *P. W. R. 1911 (Mussammat Masum Begam v. Madan Mohan Lal).*

(8) (1907) 12 *Cal. W. N. 625 (Ram Ratan v. Jogesh Chandra).*

The order of the Court was delivered by—

JOHNSTONE, J.—Miran Bakhsh, Nur Elahi and Mir Ahmad 30th March 1914. are defendants in this case, and the plaintiffs are Mahtab Din, Shahab Din and Jiwa. The claim was for Rs. 5,905 and the prayer was that a decree be passed for this sum and that it be recovered by auction sale of certain properties in accordance with the mortgage-deed * of 23rd May 1901, on which the claim is based, and also from the person and other property of defendant Mahtab Din; or "any other relief," etc. The properties mentioned in that deed, executed by Mahtab Din, defendant alone, are these :—

- (i) Half of 153 *kanals* 2 *marlas* of land held in mortgage in equal shares by Mahtab Din and Shahab Din ;
- (ii) Mahtab Din's share in 24 shops and houses held jointly by him and Shahab Din by virtue of mortgage and purchase.

Of the house property details are given of 14 premises thus :—

- (a) One-fourth of a *tawela* in Kotwali P'azar, Hoshiarpur, with 8 shops ;
- (b) One-half of shop known as Sandhe Khanwala ;
- (c) One-half of shop near Khara well ;
- (d) One-half of house known as Phillaurianwala ;
- (e) One-half of house purchased from Nizam Din at auction sale ;
- (f) One-half of house and well, known as Nawab Sahibwala.

In the plaint further details of the property are given, but we need not reproduce them here, except this that among the mortgaged property are 9 shops known as Sodhi Kartar Singhwali.

The claim of Rs. 5,905 is thus arrived at :—

	Rs.
Principal	3,500
Interest for 12 years at Rs. 35 per mensem	5,040
Total ...	8,540
Repaid in connection with the Sodhi Kartar Singhwali shops†	2,635
Balance ...	5,905

* Exhibit P. I, page 6, paper book.

† i.e. Rs. 1,741-14-6 principal plus Rs. 892-1-6 interest on that sum.

Two reasons are given in the plaint for impleading Shahab Din as defendant, namely, in para. II, that he claims some of the property as wholly his, and in para. VI, that he is co-partner in "the *khata*" (i) above. As to defendant 3, Jiwa, the land in (i) consists of two parts thus :—

(A) 73 *kanals* 1 *marla* owned by Fazl Muhammad and others ; (B) 80 *kanals* 12 *marlas* owned by defendant 3. [It will be seen that there is a slight difference (11 *marlas*) between the total here and in mortgage-deed ; but for the purposes of this appeal the matter is unimportant.] It is alleged by plaintiffs that Mahtab Din, defendant, has received half the mortgage debt due on (B) from Jiwa, defendant, and has allowed him to redeem to that extent ; and this is the reason for impleading Jiwa.

Mahtab Din, defendant, put in pleas, ending up with the admission that plaintiffs are undoubtedly entitled to a decree, and with the contention that the decree should be against Shahab Din as well and should be realised by sale of the joint property of both, without specification of shares, as both are liable, and not from the person and property of Mahtab Din alone.

Shahab Din denied all knowledge of the mortgage-deed and claimed as his own :—

The shop near the Khara well, (c) above ;
The house known as Phillaurianwala, (d) above ;
The house known as Nawab Sahibwala, (f) above.
Tawela and 8 shops, (a) above ;

and he also contended, *inter alia*, that the claim could not be enforced against the joint property until partition had been effected.

Apparently Jiwa, defendant, put in no pleas.

The Court below found—

That the shop near Khara well was joint of the two defendants ;

That in the Phillaurianwala shop defendant Mahtab Din has no share ;

That in the Nawab Sahibwala house defendant Mahtab Din has no share ;

That the mortgage by Mahtab Din of his own share in joint property was lawful and enforceable ;

That that defendant's share in the Sandhe Khanwali and Nizam Dinwali properties could be sold under this claim, even though possession is with Shahab Din ;

That Rs. 175 should be recovered from the person of Shahab Din, and the rest of the debt from the person of Mahtab Din and from such parts of the properties in suit as have been found to be owned by him.

A few words are necessary in order to explain the allocation of this sum of Rs. 175; [but first it may be noted that it is by no means clear why no issue was framed and no decision arrived at regarding the *tawela* with 8 shops, (a) above.] One house included in the mortgage-deed in suit was owned by one Bhola and was in mortgage with Mahtab Din and Shahab Din for Rs. 200. The latter realised the whole sum and allowed redemption, and so has been held personally liable for Rs. 100 principal *plus* Rs. 75 interest thereon.

The decree based on these findings bears date 28th August 1911. On 27th November 1911 Shahab Din presented this appeal, making only the plaintiffs respondents. The appeal was admitted on 4th January 1912, printing notices were issued and on 20th December 1913 the case actually came before a Division Bench, though it was not reached and had to be adjourned. Up to that time Mahtab Din had not been mentioned as a party to the appeal, and it was only on 27th February 1914 that application was made to a Judge in Chambers to add the name of Mahtab Din as a respondent, the usual order, dated 5th March 1914, being passed adding the name "subject to all just exceptions."

Mr. Kureshi and Mr. Shah Nawaz appear for Mahtab Din and for plaintiffs, respectively. Both object to the impleading of Mahtab Din at this late stage; and we have heard Mr. Shah Nawaz, who contends, first, that to implead him is illegal; secondly, that, if the mere adding of his name is not illegal, nevertheless the fact remains that the appeal against him is barred by time; thirdly, that the Court has a discretion in the matter and should refrain from exercising it in favour of the appellant; fourthly, that, if the name is excluded, virtually all the questions raised in the appeal are *res judicata*.

The order of the Judge in Chambers aforesaid was an order under order 41, rule 20, Civil Procedure Code. Mahtab Din certainly is "interested" and he was a party to the suit. This Court, therefore, has power to implead him as respondent; and in connection with the plea of limitation we think the authorities are in favour of the view that the law of limitation has no application to action taken by the Court under the rule

quoted : *cf. I. L. R. 13 All. 78 (1), 14 All. 154 (F. B.) (2), 15 Mad. 362 (F. B.) (3), 33 Cal. 329 (4)*. Against this view Mr. Shah Nawaz refers us to page 35 of *All. W. N.*, 1893 (5), *I. L. R. 10 Cal. 445 (6)*, and *8 P. W. R. 11 (7)* ; but none of these lays it down that an order under order 41, rule 20 (corresponding to section 559, old Civil Procedure Code) impleading a respondent at a time when appeal against him would be barred, is illegal, or that the law of limitation has any application in such a case.

In the Allahabad case of 1893 (5) it was found that the order impleading the respondent was not passed under section 559 at all. In *8 P. W. R. 11 (7)*, the decision was merely that omission through ignorance to put in within time, along with a memorandum of appeal, copy of decree appealed against, could not be condoned under Section 5, Limitation Act.

In the Calcutta case (6) the matter was dealt with under section 5, Limitation Act, and it was held that in the circumstances stated no case for condonation of delay had been made out.

In *12 Cal. W. N. 625 (8)*, it is true that there occurs a *dictum* which seems to support Mr. Shah Nawaz's argument. An application had been made in the Lower Appellate Court for impleading respondents after time and had been refused. The High Court as to this remarked that the application had been rightly refused, inasmuch as it "was made long after the 'time for presenting the appeal. They could not, at the 'stage at which the application was made, be made parties."

The question is not discussed and the authorities to the contrary are not refuted or even mentioned ; and we think the learned Judges meant really no more than this, that in all the circumstances leave to implead the new respondents was rightly refused and the Court's discretion wisely exercised.

The power to take action under order 41, rule 20, Civil Procedure Code, is however, discretionary ; and we are of opinion that we should decline to exercise it here. Appellant's negligence was extreme. The whole contest really was

(1) (1889) *I. L. R. 13 All. 78 (Sohna v. Khalak Singh)*.

(2) (1892) *I. L. R. 11 All. 151 (F. B.) (Bindeshri Naik v. Ganga Soran Sahu)*.

(3) (1892) *I. L. R. 15 Mad. 362 (F. B.) (Kanagappa v. Sakalinga)*.

(4) (1905) *I. L. R. 33 Cal. 329 (Girish Chander v. Sasi Sekharieswar)*.

(5) (1893) *All. W. N. 35 (Umed Singh v. Dalip)*.

(6) (1884) *I. L. R. 10 Cal. 445 (Corporation of the town of Calcutta v. Anderson)*.

(7) *8 P. W. R. 1911 (Mussammatt Masum Begam v. Madan Mohan Lal)*.

(8) (1907) *12 Cal. W. N. 625 (Ram Rattan v. Jogesh Chandra)*.

between him and Mahtab Din, for neither of them denied that plaintiffs were entitled to the sum claimed by them. The real questions at issue were which defendant was liable and to what extent, and which of them owned this or that part of the mortgaged property. The omission was not of the same character as a clerical error or slip of the pen, but seems to have been due to an essential misunderstanding of the case and of the law applicable to it. We, therefore, cancel the order of 5th March 1914 and dismiss the application of 27th February 1914.

We have not yet heard fully argued the question of the effect of a finding like this on the appeal as a whole. Respondents argue that the whole appeal goes; while appellant contends that in part it survives. A convenient date will be fixed for hearing counsel further.

The final judgment of the Court was delivered by—

JOHNSTONE, J.—This case was adjourned for further argument as to the effect on the appeal of the findings arrived at in our order of 30th March 1914, which with this will form our judgment in this case. We have now heard Mr. Fazl-i-Hussain at some length, with the result that, without calling upon Mr. Shah Nawaz for reply, we think the appeal wholly fails except in one small particular. We do not think the ruling *I. L. R. 12 Cal. 580 (F. B.)* (1), quoted by him is in point; and indeed it seems to us obvious that cases of this sort stand to be decided each on its own peculiar facts.

9th April 1914.

The state of affairs now is briefly this. Apart from the amendment of decree asked for in ground 4 of appeal, Shahab Din defendant-appellant's prayers are contained in grounds 1 to 3. In each one of these, he asks this Court to rule that certain property is his and not Mahtab Din's, or that he is not liable for a certain small sum of money. In no case does he contest plaintiff's right to the sum of money decreed in his favour.

Now it has been finally decided that the property in question (*i.e.* half of the shop near *Chah Khara* and so on) belongs to Mahtab Din, and that Shahab Din and not Mahtab Din is liable for the small sum of money aforesaid; and in consequence of our finding in our previous order, that decision cannot now be contested. What Shahab Din now asks us to do, therefore, is to rule that, though as between him and Mahtab Din these matters have been finally disposed of in favour of

(1) (1886) *I. L. R. 12 Cal. 580 (F. B.)* (*Brojo Behari Mitter v. Kedar Nath*).

Mahtab Din, yet we should give exactly the contrary decision on these same matters of fact as between Shahab Din and plaintiff.

This in our opinion we cannot do; nor can we allow Mr. Fazl-i-Hussain, as he has attempted to do, to import into his appeal matters not mentioned in the grounds.

As regards ground 4, in which as well as in ground 1, we may observe that "*Chah Khadar*" appears to be a mistake for "*Chah Khara*", there is certainly an ambiguity in the decree. There is no dispute on the point. We order amendment of the decree by the insertion of the words "of" before "shops adjacent to *Khara* well" and of the words " $\frac{1}{2}$ of" before "the house known as *Khola* Nizamudinwala."

In all other respects we dismiss the appeal with costs throughout.

Appeal dismissed.

No 80.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Shadi Lal.

MUSSAMMAT SADA KAUR—(PLAINTIFF)—PETITIONER.

Versus

BUTA SINGH—(DEFENDANT)—RESPONDENT.

Civil Revision No. 2483 of 1911.

Punjab Courts Act, XVIII of 1881 (as amended by Act XXV of 1899), section 70 (1) (a)—power of Chief Court to revise an order rejecting a plaint for non-payment of extra Court fee—decree—appealable—Civil Procedure Code, 1908, sections 2, 96 (1), 115—Court Fees Act, VII of 1870, section 12.

Where the Court in which a suit was instituted held that it had been undervalued and directed the plaintiff to pay additional Court fee and refusing plaintiff's prayer for four months' time proceeded to reject the plaint under order 7, rule 11 (b) of the Code of Civil Procedure—

Held, that the order is a decree within the meaning of section 2 of the Code, and is appealable notwithstanding the provisions of section 12 of the Court Fees Act and consequently no revision against the order could be entertained by the Chief Court under section 70 (1) (a) of the Punjab Court Act.

I. L. R. 6 Cal. 249 (1), 14 Cal. W. N. 343 (2), I. L. R. 11 All. 91 (F. B.) (3), 12 Cal. L. R. 148 (4), I. L. R. 28 Cal. 334 (5), referred to.

I. L. R. 12 All. 129 (F. B.) (6), I. L. R. 14 Mad. 169 (7), I. L. R. 10 Bom. 610 (8) and I. L. R. 7 Bom. 341 (9), distinguished.

(1) (1880) *I. L. R. 6 Cal. 249* (*Ajoodhya Pershad v. Gunga Pershad*).

(2) (1909) *14 Cal. W. N. 343* (*Prakash Chandra Sarkar v. Bishambhar Sahi*).

(3) (1888) *I. L. R. 11 All. 91 (F. B.)* (*Muhammad Sadik v. Muhammad Jan*).

(4) (1882) *12 Cal. L. R. 148* (*In the matter of Omrao Mirza v. Mary Jones*).

(5) (1901) *I. L. R. 28 Cal. 334* (*Studd v. Mati Mahto*).

(6) (1890) *I. L. R. 12 All. 129 (F. B.)* (*Balkaran Rai v. Gobind Nath*).

(7) (1890) *I. L. R. 14 Mad. 169* (*Kanaran v. Konappan*).

(8) (1886) *I. L. R. 10 Bom. 610 (F. B.)* (*Vithal Krishna v. Bal Krishna*).

(9) (1883) *I. L. R. 7 Bom. 341* (*Shiva Nathaji v. Joma Kashinath*).

Petition for revision of the order of Munshi Barkat Ali, Subordinate Judge, 2nd class, Montgomery, dated the 24th August 1911.

Jai Gopal, for petitioner.

Obedullah for respondent.

The judgment of the Court was delivered by—

JOHNSTONE, J.—On 28th August 1911 the Subordinate Judge of Montgomery passed the order, revision of which is now asked for. The claim was for property valued in the plaint at Rs. 1,400. A question of valuation was raised, and the Local Commissioner, who was appointed to assess the value, put it at Rs. 3,500. 6th April 1914.

The Subordinate Judge, finding that plaintiff had paid Court-fee only to the amount of Rs. 94-8-0 ruled that he must pay Rs. 105-8-0 more. Plaintiff was not satisfied and asked that another commissioner be appointed, but when he was directed to deposit Rs. 10 as commissioner's fee, he refused to pay it.

No objections to the report of the Local Commissioner were put in by either party, but plaintiff begged for four months' time within which to pay up the deficiency in Court-fee, and the Court, seeing no sufficient reason for the indulgence proceeded to reject the plaint under Order VII, rule 11 (b), Civil Procedure Code.

Against this order plaintiff has presented a petition on the revision side, and this petition was admitted under section 71 (1) (a), Punjab Courts Act, as it stood before the recent amendment.

Coming before the late Hon'ble Chief Judge the petition was heard from the point of view of the objection, based on section 115, Civil Procedure Code, that inasmuch as an appeal lay from the order under revision, revision was not competent. This question has been referred to a Division Bench by the said Judge and we have heard it argued.

The first question is whether an appeal does lie. The definition of "decree" in section 2, Civil Procedure Code, shews that an order rejecting a plaint is a decree and, of course, an appeal lies against a decree of an original Court "save where otherwise expressly provided in the body of "this Code * or by any other law for the time being in force," see section 96 (1), Civil Procedure Code. Now there is no

* i. e. Civil Procedure Code.

provision of the Code rendering inadmissible an appeal from such a decree as this ; and plaintiff in support of his contention that no appeal lies, can only refer us to section 12, Court Fees Act, whereby the order of a Court valuing a suit and deciding what Court fee is required, is “final,” *i. e.*, not appealable.

But the sufficient answer to this argument is that the order rejecting the plaint is not an order under section 12, Court Fees Act. No doubt no appeal would lie against an order standing by itself valuing the suit at Rs. 3,500 and directing plaintiff to pay additional Court-fee ; but we can find no provision preventing appeal against the order *rejecting the plaint*.

In support of the objection that appeal was competent and therefore no revision lies, we have been referred by Mr. Obedullah, who appears for the respondent, to *I L. R. 6 Cal. 249 (1)*, to *14 Cal. W. N. 343 (2)*, and to *I L. R. 11 All. 91 (F. B.) (3)*, all these rulings dealt with the Civil Procedure Code of 1882 ; but the *ratio decidendi* would *mutatis mutandis* apply equally well to cases under the new Code.

In *6 Cal. (1)* it was laid down that the finality declared by section 12, Court Fees Act, was removed by the Civil Procedure Code of 1882, inasmuch as, under the already amended definition of the word “decree,” an appeal lay against an order rejecting a plaint—section 54 (b) and section 2 of that Code.

In *14 Cal. W. N. 343 (2)*, we may reproduce here the head note which fully and sufficiently expresses the decision arrived at :—

“Where the Court in which a suit was instituted held “that it had been undervalued and directed the plaintiff to “pay additional Court-fee by a certain date, but the plaintiff “having failed to do so the case was dismissed.

“*Held* that an appeal lay against the decree dismissing “the suit, and in that appeal the decision of the first Court “regarding the valuation of the suit could be questioned, section “12 of the Court Fees Act notwithstanding.”

(1) 1880, *I. L. R. 6 Cal. 249* (*Ajoodhya Pershad v. Ganga Pershad*).

(2) 1909, *14 Cal. W. N. 343* (*Prakash Chandra Sarkar v. Bishambhar Sahi*).

(3) 1888, *I. L. R. 11 All. 91 (F. B.)* (*Muhammad Sadik v. Muhammad Jaw*).

This decision was supported by reference to two rulings of the same Court, *viz*; 12 *C. L. R.* 148 (1), and *I. L. R.* 28 *Cal.* 334 (2), which appear to us exactly in point; and we do not think the applicability of the finding is in any degree lessened by the fact that it is said that the "case was dismissed" instead of the "plaint was rejected." The point is that an appeal lies notwithstanding section 12, Court Fees Act.

In 11 *All.* 91 (*F. B.*) (3), it was unanimously decided that in a case which was virtually one of rejection of a plaint under section 54, Civil Procedure Code of 1882, the order passed was a "decree" and so appealable, appeal not being prohibited by section 12, Court Fees Act. The learned Judges followed *I. L. R.* 6 *Cal.* 249 (4), already noted and said—"In our opinion the intention of the framers of the Code of Civil Procedure was that there should be an appeal in every case falling within section 54."

Mr. Jai Gopal Sethi, speaking for the petitioner, meets these rulings with *I. L. R.* 12 *All.* 129 (*F. B.*) (5), which he contends virtually overrules 11 *All.* 91 (*F. B.*) (3). Perusal of the judgment of the learned Chief Justice, shews that it in effect lays down the proposition that, notwithstanding that an order rejecting a plaint or dismissing a suit may be a decree and so be appealable under the Civil Procedure Code, no question as to valuation of suit in the strict sense of the term can, in the face of section 12, Court Fees Act, be agitated in the appeal against such order.

There is thus a conflict of authority in connection with the point just stated; but we do not find ourselves called upon to decide between the disputants. It is enough for the purposes of the present case for us to hold that an appeal did lie against the order we are asked to revise; and we may point out that perusal, to go no further, of the first paragraph of the petition before us shews that the principal objection urged against the order under revision is not connected in any way with the valuation of the suit, but is an objection that sufficient time was not allowed for payment of additional Court-fee.

Holding that appeal did lie, we have next to see whether this finding bars revision.

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- (1) (1882) 12 *Cal. L. R.* 148 (*In the matter of Omrao Mirza v. Mary Jones*).
 - (2) (1901) *I. L. R.* 28 *Cal.* 334 (*Stuall v. Mati Mahto*).
 - (3) (1888) *I. L. R.* 11 *All.* 91 (*F. B.*) (*Muhammad Sadik v. Muhammad Jan*).
 - (4) (1880) *I. L. R.* 6 *Cal.* 249 (*Ajoodhya Pershad v. Gunga Pershad*).
 - (5) (1890) *I. L. R.* 12 *All.* 129 (*F. B.*) (*Balkaran Rai v. Gobind Nath*).

It seems to us that section 115, Civil Procedure Code, is clear enough ; but Mr. Jai Gopal Sethi refers us to *I. L. R. 14 Mad. 169* (1), and to *I. L. R. 10 Bom. 610* (2). The former ruling expressly refers to *I. L. R. 6 Cal. 249* (3), as laying it down “ that where it is not a mere question of the amount or “ arithmetical calculation the section (meaning section 12, Court “ Fees Act) does not apply.”

We can find nothing like this in the Calcutta case. Further, the petition before the Madras Court was one of appeal and not of revision, and the *appeal* was accepted. It seems to us, therefore, that the Court did not intend to lay it down that a petition for revision in the technical sense was competent in such a case ; but merely that section 12, Court Fees Act, did not prevent *interference*, that is to say, on appeal.

As to *10 Bom. 610* (2), the *dictum* that the High Court could interfere on revision on a question of valuation of suit for Court-fee is expressly limited to the “ particular cases pointed out in ” *I. L. R. 7 Bom. 341* (4), reference to which ruling shews that it deals mainly with the special powers of that High Court under its Letters Patent. We do not think that ruling affords any useful guide here.

Our opinion, therefore, is that this revision does not lie, and it is too late to allow us to convert it into an appeal. The petition is dismissed with costs.

Petition dismissed.

Full Bench.

No. 81.

*Before Hon. Mr. Justice Johnstone, Hon. Mr. Justice Rattigan,
and Hon. Mr. Justice Shah Din.*

ARJAN SINGH—(PLAINTIFF)—APPELLANT.

Versus

LACHHMAN SINGH AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1280 of 1910.

Indian Limitation Act, IX of 1908, articles 119, 114—suit by adopted son for possession of immovable property.

Held, that when a plaintiff sues for possession of immovable property alleging that he is the adopted son of the last proprietor and his adoption

(1) (1890) *I. L. R. 11 Mad. 169* (*Kanaran v. Komappan*).

(2) (1886) *I. L. R. 10 Bom. 610* (F. B.) (*Vithal Krishna v. Bal Krishna*).

(3) (1880) *I. L. R. 6 Cal. 219* (*Ajoodhya Pershad v. Gunga Pershad*).

(4) (1883) *I. L. R. 7 Bom. 341* (*Shiva Nathaji v. Joma Kashinath*).

is denied, his suit is governed, not by article 119 but by article 144 of the first schedule of the Limitation Act.

I. L. R. 13 Cal. 308 (P. C.) (1), I. L. R. 20 Cal. 487 (P. C.) (2), I. L. R. 22 Cal. 609 (P. C.) (3), I. L. R. 20 Mad. 40 (4), I. L. R. 26 Mad. 291 (F. B.) (5), I. L. R. 24 Bom. 260 (F. B.) (6), I. L. R. 25 Cal. 354 (7), I. L. R. 27 Cal. 242 (8), I. L. R. 24 All. 195 (9), I. L. R. 26 All. 40 (10), 71 P. R. 1901 (11), 20 P. R. 1902 (12), 68 P. R. 1903 (13), 3 P. R. 1904 (14), 1 P. R. 1907 (15), 56 P. R. 1903 (F. B.) (pp. 244–247) (16), I. L. R. 28 All. 727 (P. C.) (17), I. L. R. 30 Mad. 308 (18), 96 P. R. 1908 (19), 44 P. R. 1911 (20), I. L. R. 37 Bom. 513 (532–534) (21) and I. L. R. 39 Cal. 418 (22), 126 P. R. 1912 (P. C.) (23), referred to.

Further appeal from the decree of Major B. O. Roe, Divisional Judge, Amritsar, dated the 3rd August 1910.

Pestonji Dadabhoy, for appellant.

Muhammad Shafi, for respondents.

The order of the Court was delivered by---

SHAH DIX, J.—The question referred to the Full Bench is 9th April 1914. as follows :—

“ When a plaintiff sues for possession of immovable property stating himself to be the adopted son of the last proprietor and his adoption is denied, is his claim governed by article 119 or article 144 of the Second (First) Schedule of the Indian Limitation Act ” ?

Before the decision of their Lordships of the Privy Council in *I. L. R. 28 All. 727* (17) was published, there was a conflict of opinion among the various High Courts in this country as to

- (1) (1886) *I. L. R. 13 Cal. 308 (P. C.) (Jagadamba v. Dakkhina Mohun Roy).*
- (2) (1892) *I. L. R. 20 Cal. 487 (P. C.) (Mohesh Narain v. Taruck Nath).*
- (3) (1894) *I. L. R. 22 Cal. 609 (P. C.) (Lachman Lal v. Kanhaya Lal).*
- (4) (1896) *I. L. R. 20 Mad. 40 (Parrathi Ammal v. Saminatha Gurukul).*
- (5) (1902) *I. L. R. 26 Mad. 291 (F. B.) (Ratnamasari v. Akilandammal).*
- (6) (1899) *I. L. R. 21 Bom. 260 (F. B.) (Shrinivas Murar v. Hanmant Chardo).*
- (7) (1897) *I. L. R. 25 Cal. 354 (Jagannath Prasad v. Runjit Singh).*
- (8) (1899) *I. L. R. 27 Cal. 242 (Ram Chandra v. Ranjit Singh).*
- (9) (1901) *I. L. R. 24 All. 195 (Lali v. Murlidhar).*
- (10) (1903) *I. L. R. 26 All. 40 (Chandania v. Satig Ram).*
- (11) 71 P. R. 1901 (*Gujar Singh v. Puran*).
- (12) 20 P. R. 1902 (*Ganesha Singh v. Nathu*).
- (13) 68 P. R. 1903 (*Bhupa v. Nigahia*).
- (14) 3 P. R. 1904 (*Ram Narain v. Maharaj Narain*).
- (15) 1 P. R. 1907 (*Muhammad Niaz-ud-Din Khan v. Muhammad Umar Khan*).
- (16) 56 P. R. 1903 (F. B.) (pp. 244–247) (*Dheeru v. Sidhu*).
- (17) (1906) *I. L. R. 28 All. 727 (P. C.) (Tirbhuvan v. Rameshar Bakhsh Singh).*
- (18) (1907) *I. L. R. 30 Mad. 308 (Velaga v. Bandlamudi).*
- (19) 96 P. R. 1908 (*Surjan Singh v. Kharak Singh*).
- (20) 44 P. R. 1911 (*Nathu v. Rahman*).
- (21) (1913) *I. L. R. 37 Bom. 513 (532–534) (Shrinivas v. Balwant Venkatesh).*
- (22) (1911) *I. L. R. 39 Cal. 418 (P. C.) (Muhammad Umar Khan v. Muhammad Niaz-ud-Din Khan).*
- (23) 126 P. R. 1912 (P. C.)

the correct interpretation to be placed upon articles 118 and 119 of the Second Schedule to the Limitation Act of 1877.

With reference to certain observations which had been made by their Lordships in *I. L. R. 13 Cal. 308* (1), *I. L. R. 20 Cal. 487* (2) and *I. L. R. 22 Cal. 609* (3), the Madras and Bombay High Courts held that articles 118 and 119 of the said Act applied not only to suits for a declaration that an alleged adoption was invalid or never in fact took place or that an adoption was valid, as the case may be, but also to suits for possession of immovable property in which the plaintiff could not succeed without displacing an alleged adoption of the defendant by proving that it was invalid or never in fact took place, or without proving that an adoption (set up by the plaintiff) was valid. (*I. L. R. 20 Mad. 40* (4), *I. L. R. 26 Mad. 291* (F. B.) (5), *I. L. R. 24 Bom. 260* (F. B.) (6).

On the other hand, the Calcutta and Allahabad High Courts held that the remarks of their Lordships of the Privy Council in the three cases above cited had not a direct bearing upon articles 118 and 119 of the Limitation Act of 1877, and that those articles applied only to suits for a declaratory decree as to the invalidity or validity of an adoption, as the case may be, and not to suits for possession of immovable property notwithstanding that the plaintiff might have to prove the invalidity of an adoption or to establish its validity as the basis of his title to such property. The latter class of suits were, according to the Calcutta and Allahabad High Courts, governed by article 144 of the Limitation Act. (*I. L. R. 25 Cal. 354* (7), *I. L. R. 27 Cal. 242* (8), *I. L. R. 24 All. 195* (9) and *I. L. R. 26 All. 40* (10)).

In our own Court the majority of the Judges adopted the same view as was held by the Madras and Bombay High Courts (Nos. 71 *P. R.* 1901 (11), 20 *P. R.* 1902 (12), 68 *P. R.* 1903 (13),

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- (1) (1886) *I. L. R. 13 Cal. 308* (P. C.) (*Jagadamba v. Dakkhina Mohun Roy*).
 - (2) (1892) *I. L. R. 20 Cal. 487* (P. C.) (*Mohesh Narain v. Taruk Nath*).
 - (3) (1894) *I. L. R. 22 Cal. 609* (P. C.) (*Lachman Lal v. Kanhya Lal*).
 - (4) (1896) *I. L. R. 20 Mad. 40* (*Parrathi Annal v. Saminatha Gurukal*).
 - (5) (1902) *I. L. R. 26 Mad. 291* (F. B.) (*Ratnamasari v. Akilandammal*).
 - (6) (1899) *I. L. R. 24 Bom. 260* (F. B.) (*Srinivas Murar v. Hanmant Chardo*).
 - (7) (1897) *I. L. R. 25 Cal. 354* (*Jugannath Prosad v. Ranjit Singh*).
 - (8) (1899) *I. L. R. 27 Cal. 242* (*Ram Chandra v. Ranjit Singh*).
 - (9) (1901) *I. L. R. 24 All. 195* (*Lali v. Maridhar*).
 - (10) (1903) *I. L. R. 26 All. 40* (*Chandania v. Satig Ram*).
 - (11) 71 *P. R.* 1901 (*Gujar Singh v. Puran*).
 - (12) 20 *P. R.* 1902 (*Ganesha Singh v. Nathu*).
 - (13) 68 *P. R.* 1903 (*Bhupa v. Nigahia*).

3 P. R. 1904 (1), 1 P. R. 1907 (2)). Sir William Clark, C. J., however, expressed a different view in 56 P. R. 1903 (F. B.) (3) at pages 244 to 247.

Since the publication of the decision of their Lordships of the Judicial Committee in *I. L. R. 28 All. 727* (4) the Madras High Court has held in *I. L. R. 30 Mad. 308* (5) that article 118 of the Limitation Act, 1877, applies only to declaratory suits in respect of adoption and not to suits for possession of immovable property, the period of limitation applicable to the latter class of suits being that prescribed by article 144 of the said Act.

The Madras decision has been followed by our own Court in 96 P. R. 1908 (6) and 44 P. R. 1911 (7), and although the rulings in the two last mentioned cases have reference to article 118 of the Limitation Act, the *ratio decidendi* of these rulings applies, in my opinion, equally to a suit like the present in which the plaintiff sues for possession of immovable property on the ground that he is the adopted son of the last male owner and the suit is brought more than six years after his rights as an adopted son had been interfered with.

On behalf of the respondents Mr. Muhammad Shafi has strenuously contended that the observations of their Lordships of the Privy Council in *I. L. R. 28 All. 727* (at page 739) (4), with reference to which the Madras High Court and this Court have held that article 118 of the Limitation Act applies merely to a suit for a declaration of the invalidity of an alleged adoption and not to a suit for possession of immovable property in which adoption is set up as a defence, have been misunderstood: and that those observations cannot be taken to mean that the Judicial Committee has in any way departed from the principle applicable to cases falling within the purview of articles 118 and 119 of the Limitation Act which was laid down in *I. L. R. 13 Cal. 308* (8), 20 Cal. 487 (9) and 22 Cal. 609 (10).

(1) 3 P. R. 1904 (*Ram Narain v. Maharaj Narain*).

(2) 1 P. R. 1907 (*Muhammad Niaz-ud-Din Khan v. Muhammad Umar Khan*).

(3) 56 P. R. 1903 (F. B.) (pp. 244-247) (*Dheru v. Sidhu*).

(4) (1906) *I. L. R. 28 All. 727* (P. C.) (*Tirbhuwan v. Rameshar Bakhsh Singh*).

(5) (1907) *I. L. R. 30 Mad. 308* (*Velaga v. Bandlamudi*).

(6) 96 P. R. 1908 (*Surjen Singh v. Kharak Singh*).

(7) 44 P. R. 1911 (*Nathu v. Rahman*).

(8) (1886) *I. L. R. 13 Cal. 308* (P. C.) (*Jagadamba v. Dakkhina Mohun Roy*).

(9) (1892) *I. L. R. 20 Cal. 487* (P. C.) (*Mohesh Narain v. Taruck Nath*).

(10) (1894) *I. L. R. 22 Cal. 609* (P. C.) (*Lachman Lal v. Kanhaya Lal*).

The learned counsel has argued that the admission of Mr. Cohen to which reference is made in the third paragraph at page 739 of the report of their Lordships' judgment had reference to his (Mr. Cohen's) argument as to acquisition of title by his client within the meaning of section 2 of the Limitation Act of 1877 by reason of the lapse of twelve years since the date of his adoption before the said Act came into force, and that Mr. Cohen never admitted, and could not therefore have been understood to admit, that article 118 of the Limitation Act of 1877 applied only to declaratory suits and not to a suit for possession like the one which had been filed by the opposite party in that case.

Speaking for myself, I think, that there is much force in Mr. Shafi's contention and his argument derives considerable strength from what Mr. Justice Chandavarkar has said on the same subject in his very lucid judgment in *I. L. R. 37 Bom. 513*, at pages 532 to 534 (1) of the report.

But, in my opinion, the matter is made much clearer in the very recent decision of their Lordships in the case of *Muhammad Umar Khan and others v. Niaz-ud-din Khan (I. L. R. 39 Cal. 418 (P. C.) (2), 126 P. R. 1912 (3))*. In delivering the judgment of their Lordships in that case Sir John Edge says at page 432 :—

"Although their Lordships consider that the question of an adoption was an immaterial issue, they think it advisable to say that the omission to bring within the period prescribed by article 118 of the second schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakar Tirbhuvan Bahadur Singh v. Raja Rameshar Bakhsh Singh* (4). Under the general Muhammadan Law an adoption cannot be made; an adoption, if made in fact by a Muhammadan, could carry with it no right of inheritance."

Now the judgment of their Lordships was delivered on appeal from the judgment and decree of this Court in the case of *Niaz-ud-din Khan v. Muhammad Umar Khan and others* which is printed as No. 1 P. R. 1907 (5); and it will be found

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- (1) (1913) *I. L. R. 37 Bom. 513* (532-534) (*Shrinivas v. Balwant Venkatesh*).
 (2) (1911) *I. L. R. 39 Cal. 418* (P.C.) } (*Muhammad Umar Khan v. Muhammad Niaz-ud-Din Khan*).
 (3) 126 P. R. 1912
 (4) (1906) *I. L. R. 28 All. 727* (P. C.) (*Tirbhuvan v. Rameshar Bakhsh Singh*).
 (5) 1 P. R. 1907 (*Muhammad Niaz-ud-Din Khan v. Muhammad Umar Khan*).

that in the judgment of this Court, which was delivered by Mr. Justice Johnstone, there was a full discussion of the question whether articles 118 and 119 of the Limitation Act of 1877 were applicable only to declaratory suits or also to suits for possession of immovable property in which the validity or invalidity of an adoption comes into question, and it was held that the Privy Council decision in *I. L. R. 13 Cal. 308 (1)* which had been followed by the Madras and Bombay High Courts and also by this Court was authority for holding that a suit for possession was governed by the said articles of the Limitation Act equally with suits for a declaration (see pages 13 to 15 of the report). After discussing the questions whether the defendant Niaz-ud-din Khan had or had not been adopted by Mussammat Zainab, and also whether the suit brought by the plaintiffs, although it was one for possession of immovable property and not one for a mere declaration of invalidity of an alleged adoption, was or was not governed by article 118 of the Limitation Act, 1877, Mr. Justice Johnstone said at page 17 : “ Finally, then, my view is that the adoption “ of defendant by Mussammat Zainab was not inherently “ invalid and so article 118 fully applies and the suit is barred.”

It was with reference to this view of Mr. Justice Johnstone as regards the applicability of article 118 of the Limitation Act to the suit of the plaintiffs that their Lordships of the Privy Council expressed their opinion in the passage quoted above ; and this expression of opinion is, it seems to me, of special significance on the question of the true construction of article 118 (and, by parity of reasoning, of article 119) of the Limitation Act of 1877.

The language used by their Lordships in the paragraph under consideration shows to my mind that their Lordships, in view of the conflict of decisions cited in the judgment of this Court on the true nature and scope of article 118 of the Limitation Act, 1877, desired to express their opinion clearly and definitely on the point of limitation involved so as to put an end to that conflict ; if that was not the intention of their Lordships it was perfectly needless for them to express themselves as they did, because, as their Lordships point out, “ the “ question of an adoption was an immaterial issue ” in the case, and therefore an expression of opinion as to whether the suit of the plaintiffs was or was not barred under article 118 of the Limitation Act was uncalled for.

(1) (1886) *I. L. R. 13 Cal. 308 (P. C.)* (*Jagadamba v. Dakhina Mohun Roy*).

In my opinion the closing sentence of the paragraph does not, as has been argued by Mr. Muhammad Shafi, govern and limit the general applicability of the principle laid down in the preceding portion of that paragraph. It appears to me that their Lordships intended to lay down a general rule that a suit by a plaintiff for possession of immovable property was not barred simply because he had omitted to bring within the period prescribed by article 118 of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption of the defendant was invalid or never, in fact, took place; and with reference to the facts of the case before them, their Lordships further pointed out by way of strengthening the argument as to the inapplicability of article 118 to a suit for possession that "under the general Muhammadan Law an adoption cannot be made; an adoption, if made in fact by a Muhammadan, would carry with it no right of inheritance"

This last observation does not mean, it seems to me, that if the alleged adoption is that of a person governed by Hindu Law or by the Customary Law of the Punjab, that in that case even a suit for possession which involves the question of the invalidity of his adoption would be governed by article 118 of the Limitation Act of 1877.

I cannot see any distinction in principle between article 118 and article 119 of the Limitation Act as regards the application of the rule of prescription governing cases of adoption, and in the published decisions of the various High Courts which have been cited and discussed before the Full Bench no such distinction has been drawn. At the present moment all the High Courts, with the single exception of the Bombay High Court, are agreed that a suit for possession of immovable property is not governed by articles 118 and 119 of the Limitation Act, and our own Court has recently adopted the same view.

For the reasons given, my answer to the reference is in the affirmative; in other words, I would hold that when a plaintiff sues for possession of immovable property alleging that he is the adopted son of the last proprietor and his adoption is denied, his suit is governed, not by article 119, but by article 144 of the First Schedule of the Indian Limitation Act.

[Mr. Justice Johnstone and Mr. Justice Rattigan concurred.]

No. 82.

*Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice
Shadi Lal.*

ABDUL ALI—(DEFENDANT)—APPELLANT.

Versus

PURAN MAL—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1200 of 1910.

Indian Evidence Act, I of 1872, section 31—entry in account book, not sufficient proof by itself—Indian Contract Act, IX of 1872, sections 60 and 74—appropriation of payment—compound interest—penalty.

Held that, under section 31 of the Evidence Act, a defendant cannot be charged with liability on mere entries in a book of account, however regularly kept.

Held also, that under section 60 of the Contract Act, in the absence of proof or circumstances indicating to which debt a payment is to be applied, the creditor may apply it to any lawful debt actually due and payable to him from the debtor.

Held further, that a stipulation to pay compound interest, not at an enhanced rate, does not come within the terms of section 74 of the Contract Act.

I. L. R. 25 All. 159 (1), 14 Indian Cases 283 (2), and I. L. R. 25 All. 284 (3), referred to.

First appeal from the decree of the District Judge of Simla, dated the 3rd of October 1910.

Muhammad Shafi, for appellant.

Bevan Petman and Mir Muhammad Khan, for respondent.

The judgment of the Court was delivered by—

JOHNSTONE, J.—This appeal and No. 27 of 1911 arise out of 12th April 1914. two connected suits, which have been discussed and disposed of by the learned District Judge in one judgment. That judgment is sufficiently full and clear, and it is unnecessary for us to restate the pleadings, issues and findings thereon.

It is enough to note (a) that in case No. 27 of 1911 the Court below has dismissed with costs the claim, which was for Rs. 4,700 on pro-notes and cash account and for future interest on the ground that, though this claim standing by itself was made out, defendant was entitled to set-off against it the value of building work done by him,—i.e. Rs. 5,646-4-0 principal *plus*

(1) (1902) *I. L. R. 25 All. 159 (Janki Das v. Ahmad Husain Khan).*

(2) 1912) 14 *Indian Cases 283 (Venkatchellam Chettiar v. Veerappen).*

(3) (1903) *I. L. R. 25 All. 284 (Kirpa Ram v. Sami-ud-Din Ahmad Khan).*

Rs. 1,731-6-0 interest, total Rs. 7,377-10-0—the whole claim being thus wiped out and Rs. 2,677-10-0 remaining to be credited to defendant in case No. 1200 of 1910; and (4) that in the latter case, in which the claim was for Rs. 8,461-1-6 on two mortgage deeds, the Court passed a decree in favour of plaintiff for Rs. 8,276-13-10 with costs in proportion and future interest at 6 per cent. per annum.

Defendant has appealed in No. 1200 of 1910 and plaintiff in No. 27 of 1911, and we have heard arguments and have examined the records; and we may note at once that grounds 4, 5 and 6 in the former appeal have been given up. To clear the ground further we also decide here that the objection in ground 2 of the latter appeal regarding Court-fee on defendant's claim on account of the value of the work done by him is in our opinion unsound.

We can see no good reason for supporting the objection, defendant's claim being properly taken to be merely a matter of account.

Analysis of the remaining grounds of appeal and of the arguments of counsel shews that the first question calling for decision is as to the item Rs. 3,250 (see Exhibit D. 5, page 23, paper-book A) admittedly paid by defendant to plaintiff in cash on 7th April 1904, and as to its appropriation by plaintiff to liquidation of certain debts—see page 13, *bahi* account. As stated in the account those debts were :—

	R
On pro-note, dated 8th April 1901 ...	35
On 3 other pro-notes of 1902, 1903 and 1904	1,300
Two small amounts secured by pledge of jewellery	20
Interest at 2 per cent. per mensem on above pro-notes	61
Total ...	2,485

Leaving only Rs. 765 to be credited to defendant against the mortgage debts.

Defendant's first contention in this connection is that the whole of this account of Rs. 2,485 as due from him is fictitious, and he challenges plaintiff to shew that he has proved it on the record. In our opinion plaintiff has only proved the first item of Rs. 350, in connection with which he has called the petition-writer Nand Lal with his register. That pro-note has clearly

been sufficiently proved, unless we are to attribute perjury and forgery to Nand Lal, against whom nothing of the sort is alleged; but we cannot follow Mr. Petman when he contends, on the principle *ex uno disce omnes*, that because one item, covering only a small fraction of the account, has been proved, the mere inclusion of a number of other items in that same account is in law sufficient to render defendant liable.

The law is quite clear * that in order to charge a defendant with liability something more is required than mere entry in a book of account, however well and regularly kept; and Mr. Petman has been unable to shew on the record any evidence whatever that these disputed items ever passed.

The next question is whether plaintiff was entitled to apply the payment of Rs. 3,250 to this cash account or should be compelled to apply it to the mortgage account. Here defendant's case is that he went into the witness-box and swore that he had, at time of payment, expressly intimated that he wished the latter appropriation to be made, that plaintiff has not in the witness-box denied this, and that plaintiff, who was not present † when the money was paid, has not called his man, who received the money, to contradict defendant's allegation.

In reply Mr. Petman points to the wording of Exhibit D. 5, in which no mention is made of any specific appropriation, the words being "towards principal and interest and credited to his account," and contrasts this with another receipt Exhibit D. 1, page 24, book A, in which, no doubt at request of defendant, careful and detailed appropriation was made.

Though there is this distinction between the two receipts that D. 5 was for a single payment and D. 1 was a receipt gathering together several part payments made at different dates, we think on the whole that defendant most probably made no appropriation at the time, or, if he did, made it against the account carrying 2 per cent. per mensem interest rather than against the mortgage account where the interest was only 1 per cent.

As defendant has not, in our opinion, proved that he intimated appropriation against the mortgage account and has not shewn that the circumstances point to such an appropriation having been intended, it follows—section 60, Indian Contract Act—that the option rested with plaintiff to make such appropriation against debts legally due as he might

* Section 34, Indian Evidence Act.

† Page 59, 1, 2, book A.

please. We hold, then, that of the Rs. 3,250 paid Rs. 350 *plus* Rs. 252 interest at 2 per cent. per mensem from 8th April 1901 to 7th April 1904, total Rs. 602, falls to be liquidated first, and the remainder Rs. 2,648, and not merely Rs. 765, is available in reduction of other debts.

The next question for decision concerns the mortgage-deeds, to be found at pages 3 and 5, book A. The earlier deed for Rs. 5,000 and dated 13th December 1898, provides for compound interest at 1 per cent. per mensem with half-yearly rests, while the later deed for Rs. 2,500 and dated 15th September 1900, has a similar stipulation with this difference that the rests are monthly.

The learned District Judge has ruled that these conditions are penal and are exorbitant, and so he has allowed only simple interest. Mr. Petman contends, and we think rightly, that the stipulation for compound interest is not by way of penalty and that section 74, Contract Act, has no application; and he fortifies his position with the help of *I. L. R. 25 All. 159 (1)*, and 14 *Indian Cases* 283 (2). As in those cases, so here the rate at which compound interest was to be computed was the same as that promised for simple interest, and we have no doubt of the soundness of the view taken in them that compound interest, not at an enhanced rate, is not a penalty.

No authority to the contrary is cited; and Mr. Shafi has only been able to refer us to *I. L. R. 25 All. 284 (3)*, which deals not with questions of penalty or no penalty; but lays it down that compound interest of an unconscionable amount should not be allowed.

[The remainder of the judgment is not required for the purpose of this report.—Ed]

(1) (1902) *I. L. R. 25 All. 159* (*Janki Das v. Ahmad Husain Khan*).

(2) (1912) 14 *Indian Cases* 283 (*Venkatachellam Chettiar v. Vecrappen*).

(3) (1903) *I. L. R. 25 All. 284* (*Kirpa Ram v. Sami-ul-Din Ahmad Khan*).

No. 83.

Before Hon. Mr. Justice Shah Din and Hon. Mr.
Justice Beadon.

GOBINDA MAL AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

SANTA—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 39 of 1912

Indian Limitation Act, IX of 1908, section 14—suit filed beyond period of limitation—plaint must shew ground for exemption from law of limitation—Civil Procedure Code, 1908, order 7, rule 6.

Plaintiffs sued for possession of certain land more than 12 years from date on which he was entitled to it under his mortgage deed. In his plaint he only mentioned that he had carried on previous litigation in the Revenue Courts for ejection of the defendant. The first Court found that under the provisions of section 14 of the Limitation Act, the suit was within time. The Divisional Judge on appeal held that section 14 was inapplicable and that an alleged acknowledgment upon which plaintiff also relied for the first time in his Court did not come within the terms of section 19 of the Act. On further appeal to the Chief Court—

Held, that under order 7, rule 6 of the Code of Civil Procedure the plaintiffs were bound to shew in the plaint the grounds upon which exemption from the law of limitation was claimed and that as there was no mention in the plaint of the alleged acknowledgment of liability by the defendants, plaintiffs could not be allowed to rely on it.

I. L. R. 31 Cal. 195 (1), followed.

10 Bom. L. R. 346 (2), distinguished.

Held also, that the proceedings in the Revenue Courts did not bring the case within the purview of section 14 of the Limitation Act.

Further appeal from the decree of H. Scott-Smith, Esquire, Divisional Judge, Ferozepore Division, dated the 10th October 1911.

Kanwar Narain, for appellants.

Brij Lal, for respondent.

The judgment of the Court was delivered by—

SHAH DIN, J.—This appeal arises out of a suit brought 13th Decr. 1913. by the plaintiffs-appellants for possession as mortgagees of 768 *kauils* $11\frac{1}{4}$ *murlas* of land, situate in *manza* Ghulla, which was mortgaged to them by the defendant-respondent by a registered deed, dated the 23rd September 1898, for Rs. 1,200. According to the mortgage deed, possession was

(1) (1903) *I. L. R. 31 Cal. 195* (*Jogeshwar Roy v. Raj Narain*).

(2) (1908) *10 Bom. L. R. 346* (*Yakub Ebrahim v. Bai Rahimat Bai*).

given to the mortgagees who were to cultivate the land, or get it cultivated, and to pay the land revenue thereof. The suit was instituted on the 15th February 1911, and the defendant pleaded, *inter alia*, that it was barred by limitation. One of the issues framed by the first Court was as to whether the suit was within time and in connection with that issue the plaintiffs relied on section 14 of the Limitation Act in support of their contention that they were entitled to deduct the time spent by them in prosecuting a suit in a Revenue Court for the ejectment of the defendant. In the plaint reference was made to the litigation in the Revenue Court prior to the institution of the present suit, though it was not alleged in so many words that the time covered by that litigation should be deducted in computing the period of limitation applicable to this suit.

The first Court held that section 14 of the Limitation Act was applicable to the case, and after considering certain other matters relating to the merits of the claim, with which we are not now concerned, it decreed the suit. On appeal the learned Divisional Judge held that section 14 aforesaid was wholly inapplicable; and further, with reference to the contention advanced before him for the first time by the plaintiffs' counsel that by reason of an acknowledgment of liability made by the defendant in March 1899 limitation was saved under section 19 of the Limitation Act, the learned Judge decided that the said section had no application to the alleged acknowledgment. He therefore accepted the appeal and dismissed plaintiffs' suit.

In further appeal before us the appellants' counsel has frankly admitted that he cannot rely upon section 14 of the Limitation Act as the litigation in the Revenue Court, which is referred to in the plaint, does not fall within the purview of that section. He has, however, urged that the decision of the Divisional Judge that section 19 of the Limitation Act is not applicable to the statement of the defendant, dated the 15th March 1899, is incorrect and that the acknowledgment of liability by the defendant as contained in the said statement saves the suit from being barred by time.

Now, the suit as laid in the plaint was *prima facie* barred by limitation, and under order 7. rule 6, Civil Procedure Code, the plaintiffs were bound to shew in the plaint the ground upon which exemption from

the law of limitation was claimed. In the plaint they simply referred to the previous litigation between the parties in the Revenue Court with the object of showing that they relied upon section 14 of the Limitation Act (though they did not mention the section in the plaint) to claim exemption from the operation of article 135 of the Act. There is no reference in the plaint at all to the alleged acknowledgment of liability by the defendant so as to make section 19 of the Limitation Act applicable to the case and in our opinion the plaintiffs cannot now be allowed to rely upon a ground of exemption from the law of limitation upon which the plaint is wholly silent.

We are fortified in our opinion by the decision in *I. L. R. 31 Cal. p. 195* (1), in fact, the case before us is stronger than the Calcutta case, for whereas in the Calcutta case there was a reference in the plaint to a certain alleged acknowledgment of liability by defendant which, however, was different from the acknowledgment which was subsequently relied upon under section 19 of the Limitation Act, in the present case the plaint does not even remotely suggest that any acknowledgment of whatever description had been made by the defendant so as to make section 19 of the Act applicable. We have no hesitation in following the principle underlying the Calcutta case; and we hold that it was not open to the plaintiffs in the circumstances of this particular case, to rely upon the alleged acknowledgment of liability by the defendant as a ground of exemption from the law of limitation applicable to their claim. The decision of the Bombay High Court in *Yakub Ebrahim Syani* versus *Bai Rahimat Bai* (10 B. L. R. 346) (2), on which the plaintiffs' counsel has relied, is clearly distinguishable from this case and it therefore does not help them.

For the reasons given, we hold that the plaintiffs' suit was barred by limitation, and accordingly we maintain the decree of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

(1) (1903) *I. L. R. 31 Cal. 195* (*Jogeshwar Roy v. Raj Narain*).

(2) (1908) 10 *Bom. L. R. 346* (*Yakub Ebrahim v. Bai Rahimat Bai*).

No. 84.

*Before Hon. Mr. Justice Johnstone and Hon. Mr.
Justice Chevis.*

ANANT RAM AND OTHERS—(PLAINTIFFS)—
APPELLANTS.

Versus

DAMODAR DAS AND OTHERS—(DEFENDANTS)—
RESPONDENTS

Civil Appeal No 898 of 1911.

Civil Procedure Code, 1908, order 21, rule 63—whether judgment-debtor is a party to the execution proceedings, and can maintain a declaratory suit.

P. M. and S. R. obtained a decree against C. R. and L. D. On 9th March 1910, L. D., being then dead, P. M. applied for execution, and certain shops and a house belonging to L. D. were attached. On 2nd June 1910 the minor sons of L. D. applied to the executing Court urging, *inter alia*, that the mortgage of the attached property in favour of D. D. was null and void. On 8th June 1910 D. D. lodged an objection urging that the attached property had been mortgaged to him, and should be sold subject to the mortgage charge. On this, notice issued both to the judgment-debtors and to the decree-holders. The latter admitted the mortgage was null and void. On 10th October 1910 the executing Court allowed the objection of D. D. and remarked that the judgment-debtors could bring a regular suit if so advised. On 23rd December 1900 the present suit for a declaration that the property was liable to attachment free of the mortgage charge was brought on behalf of the minor sons of L. D. and it was pleaded for the plaintiffs that the mortgage which was effected by their uncle C. R. was not binding on them.

Held, that it is a question of fact in each case whether a judgment-debtor is a party to objection proceedings and that as the order of 10th October 1910 by the executing Court allowing the objection of D. D. in spite of the protests of the judgment-debtors was an order passed against them, they must be regarded as parties to the execution proceedings and they had therefore a perfect right under order 21, rule 63 of the Code of Civil Procedure, to bring the present suit.

I. L. R. 15 Cal. 671 (1) and I. L. R. 11 Bom. 111 (2), distinguished.

Held further, that even if they were not parties to the objection proceedings, there was no reason why their right to bring a declaratory suit should be denied.

*Further appeal from the decree of L. H. Leslie Jones, Esquire,
Additional Divisional Judge, Amritsar Division, at Jullundur,
dated the 6th June 1911.*

(1) (1883) *I. L. R. 15 Cal. 671* (*Kedar Nath Chatterji v. Rukhal Das.*)

(2) (1886) *I. L. R. 11 Bom. 114* (*Shivappa v. Dod Nagaya*).

Bhagwan Das, for appellants.

Nanak Chand, for respondents.

The judgment of the Court was delivered by—

CHEVIS, J.—The facts of this case are as follows :—

31st Jany. 1914.

Phaggu Mal and Sant Ram obtained a decree against Chet Ram and Lachhman Das. On the 9th of March 1910 Lachhman Das, being then dead, Phaggu Mal applied for execution and certain shops and a house belonging to Lachhman Das were attached. On the 2nd of June 1910 the minor sons of Lachhman Das applied through their mother to the executing Court urging that execution should be taken out against Chet Ram, and not against them, and that the mortgage of the attached property in favour of Damodar Das was null and void. On the 8th of June 1910 Damodar Das lodged an objection urging that the attached property had been mortgaged to him for Rs. 4,000 and should be sold subject to the mortgage charge. On this, notice issued both to the judgment-debtors and to the decree-holders. The latter admitted the mortgage, but for the sons of Lachhman Das it was pleaded that the mortgage was null and void. On the 10th of October 1910 the executing Court allowed the objection on the ground that the decree-holders admitted the validity of the mortgage and remarked that the judgment-debtors could bring a regular suit if so advised. On the 23rd December 1910 the present suit was lodged on behalf of the minor sons of Lachhman Das, asking for a declaration that the property was liable to attachment and sale free of the mortgage charge. It was pleaded for the plaintiffs that the mortgage which was effected by their uncle, Chet Ram, was not binding on them.

The first Court, relying on *XV Cal. 674*, (1) and *XI, Bom. 114* (2), held that in the objection proceedings the judgment-debtors were not parties in point of law and that the suit as lodged was not maintainable. The learned Divisional Judge upheld the order of the first Court dismissing the suit, remarking that the plaintiffs, no doubt, had a remedy, but that their remedy was not under order *XXI*, rule 63, inasmuch as if they brought a regular suit numerous questions would arise which would require decision.

(1) (1883) *I. L. R. 15 Cal. 674* (*Kedar Nath Chatterji v. Rakhal Das*).

(2) (1886) *I. L. R. 11 Bom. 114* (*Shivappa v. Dod Nagaya*).

The plaintiffs have preferred a further appeal to this Court. We think that the view of the Lower Courts is wrong. The rulings relied on by the first Court do not lay down that the judgment-debtor is never a party to objection proceedings. All that they lay down is that, whether a judgment-debtor is to be regarded as a party to objection proceedings, must depend upon the facts of each case. In the present case the contest has throughout been between the judgment-debtors and the objector, and we consider that the order of the executing Court allowing objection, in spite of the protests of the judgment-debtors, was an order passed against them and that they must be regarded as parties to the execution proceedings.

We hold, therefore, that they have a perfect right under order XXI, rule 63, to bring the present suit. The reasons given by the learned Divisional Judge are to us somewhat unintelligible. The Divisional Judge remarks if they bring a regular suit, numerous questions will arise. They have brought a regular suit, and such questions as are necessary for the decision of that suit must be enquired into and decided.

We may further remark that even if it were held that the judgment-debtors were not parties to the objection proceedings, it would still be hard to say why their right to bring a declaratory suit should be denied. All that is laid down in rule 63 is that the party against whom an order is passed in execution proceedings may bring a suit to establish the right which he claims to the property in dispute but, subject to the result of such suit, if any, the order shall be conclusive. If the present plaintiffs are not to be regarded as parties to the suit then the closing words of rule 63 which lay down that subject to the result of such suit, if any, the order shall be conclusive, cannot apply to them.

We hold that the plaintiffs have a right to bring the present suit, and we accept the appeal and, reversing the order of the lower Courts dismissing the suit, we return the case to the first Court for decision on the merits. Stamp on appeal to this Court will be refunded, and other costs will be costs in the cause.

Appeal accepted.

No. 85.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

SAWAN SINGH—(DEFENDANT)—APPELLANT,

Versus

MOTHU AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 1409 of 1912.

Civil Procedure Code, 1908, section 105 and order 43, rule (1) (u)
—order of remand on point of custom—when appealable—*Punjab Courts Act, XVIII of 1884, section 40, as amended by Punjab Act I of 1912—Certificate of Divisional Judge in cases of orders of remand.*

In this suit the collaterals of one A. sued for a declaration that the alienations, effected by him, had been made without necessity and consideration and should not affect their reversionary rights. One of the pleas raised by the alienee was that A. was governed by his personal law and not by agricultural custom and therefore had full powers of alienation. The first Court found on this point in favour of the alienee and dismissed the suit. The Divisional Court on appeal reversed this decision, holding that A. was governed by agricultural custom by which his power of disposition was restricted and remanded the case under order 41, rule 23 of the Code of Civil Procedure for decision on the merits. The alienee appealed to the Chief Court from the order of remand—

Held, that there can be no appeal under order 41, rule 23 of the Code of Civil Procedure from a Divisional Judge's order of remand, if that order is based upon a finding of fact only; but that an appeal is competent if the preliminary point involves a question of law which would allow of a second appeal if the order appealed from were a decree and not a mere order.

I. L. R. 8 Cal. 674 (1), I. L. R. 19 Mad. 122 (2), 109 P. R. 1887 (3) and 1 P. R. 1903 (F. B.) (4), referred to.

Held also, that as in this case the question involved was one of custom and the appellant would have the right of a second appeal from the decree of the Appellate Court *only* if he were to obtain from the Divisional Judge a certificate under sub-section (3) of section 40 of the Punjab Courts Act, it could not be said definitely that an appeal would lie from the decree of the Appellate Court, and consequently no appeal was competent from the order of remand under order 43, rule (1) (u), Civil Procedure Code.

Held further, that no certificate could have been granted by the Divisional Judge in this case as section 40 (3) of the Punjab Courts Act applies only to appeals from "decrees" and not to appeals from "orders."

(1) (882; *I. L. R. 8 Cal. 674* (*Noimollah Pramanik v. Grish Narain*).

(2) 1896; *I. J. R. 19 Mad. 122* (*Vengannayyan v. Ramasami Ayyan*).

(3) 109 *P. R. 1887* (*Khulas v. Kalyan Singh*).

(4) 1 *P. R. 1903 (F. B.)* (*Maha Ram v. Ram Mahar*).

*Second appeal from the decree of T. P. Ellis, Esquire, I. C. S.,
Divisional Judge, Ferozepore Division, dated the 1st June 1912*

Kharak Singh, for appellant.

Santanam, for respondents.

The judgment of Mr. Justice Chevis was as follows :—

23rd March 1914. CHEVIS, J.—In this suit certain collaterals of Amir sue for a declaration that the alienations effected by him have been made without necessity and consideration, and should not affect their reversionary rights.

One of the pleas raised by the alienee was that Amir was not governed by agricultural custom but had full power of alienation. This formed the subject of the first issue. The first Court decided this issue against the plaintiffs and dismissed the suit. The learned Divisional Judge reversed this decision, holding that Amir was governed by agricultural custom and could not alienate ancestral land except for necessity. So the Divisional Judge remanded the case under order XLI, rule 23, for decision on the merits.

The alienee appeals to this Court from the order of remand. The case was referred by me to a Division Bench as I was doubtful whether such an order was appealable.

Order XLIII, rule (1) (u), lays down that an appeal lies from an order of remand under order XLI, rule 23, “where an appeal would lie from the decree of the appellate Court.”

Turning to section 105 of the Civil Procedure Code we see that, save as otherwise expressly provided, no appeal shall lie from any order made by a Court, but where a decree is appealed from any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. But the section then goes on to provide specially for the case of orders of remand, stating that if such orders are appealable the party aggrieved must appeal at once and cannot dispute the order later on in appeal from the final decree. So in every case the correctness of an order of remand may be disputed if, however, the order is appealable it must at once be challenged by appeal, but if it is not appealable it may be questioned in appeal from the final decree.

Now, I think, we have to consider what interpretation should be placed on the words in order XLIII, rule (1) (u)

“ where an appeal would lie from the decree of the appellate Court.”

My own opinion, formed after careful consideration, is that the decree here referred to means *such final decree as might be passed by the appellate Court*. Now if that decree be regarded as *based on the order of remand* we have a good working rule, *e. g.*, let us suppose that in the present case the first Court to whom the case is remanded finds on the merits that the alienation was wholly without necessity and on appeal by the alienee the Divisional Judge concurs, and so the final decree of the Divisional Judge is in favour of the plaintiffs. Then, but for the provisions of section 105 (2), the alienee could appeal to this Court, and could urge in his grounds of appeal that the order of remand was incorrect, and that it should have been held that the alienor was not governed by agricultural custom. But section 105 (2) lays down that where the order of remand is appealable the party aggrieved must attack it at once in appeal, and cannot wait to attack it in appeal from the final decree. The right of appeal exists in either case ; the only difference is as to the time at which the right is to be exercised.

The matter may perhaps be put in other words.

The first Court has disposed of the case on a preliminary issue, and the appellate Court has reversed the decision on that issue and remanded the case for decision on the other issues. Let us, however, suppose that, though the first Court found the suit must fail on the first issue, it had taken all the evidence and recorded findings on the remaining issues. Then the appellate Court would have no need to remand the case at all, and would be able to pass a decree. From that decree, (unless it were a decree dismissing the suit *in toto*), the defendant would have a right to appeal, but he could appeal only on certain grounds specified in section 40 of the Punjab Courts Act. He could appeal on a question of law, but not on a question of fact. With certificate from the Divisional Judge he could appeal on a point of custom.

So I think the test to be applied may be stated thus : If this order of remand were part of a judgment leading up to a final decree, could the party against whom this order is passed appeal from the decree on the ground that this particular part of the judgment is contrary to law or custom or is otherwise incorrect ?

The conclusion at which I have arrived is that if an order of remand deals solely with questions of fact it is not appealable; if it deals with points of law or custom it is appealable. In certain cases it may be appealable on grounds of error or defect in procedure, but no such question arises here.

That the legislature intends to allow appeals from orders of remand simply on questions of fact I do not for a moment believe. On this point I would refer to 8, *Cal.* 674 (1) and 19 *Mad.* 422 (2). I am aware that a different view is held in 109, *P. R.* 1887 (3); but the law of second appeal in this Province has since been brought into line with the law in other parts of India so that the argument based on anomaly referred to on page 253 of the latter ruling now has full force in the Punjab. I believe it is intended to put such orders on exactly the same footing as appellate decrees and to make them appealable on precisely the same grounds.

But the present case is one in which the question is, as to the applicability of agricultural custom to a particular person. This seems to me a question regarding the existence of a custom (*viz.*, a custom whereby the alienor cannot without the consent of his collaterals alienate his ancestral land freely). If the appeal were one from an appellate decree this question could not be gone into on appeal without a certificate from the Divisional Judge. And as I think the law has placed appeals from orders of remand on precisely the same footing as appeals from appellate decrees, I think we should require a certificate in this case from the Divisional Judge. It is true that section 40 of the Punjab Courts Act, which deals with such certificates, relates only to appeals from appellate decrees, but even this section does not (as I read it) give the Divisional Judge the power to give certificates, for the simple reason that giving a certificate is not a matter which would be illegal even without any provision of law. So I do not think the Divisional Judge would be in any way acting illegally if he were to give a certificate for appeal on a point of custom from an order of remand.

(1) (1882) *I. L. R.* 8 *Cal.* 674 (*Noimollah Pramanik v. Grish Narain*).

(2) (1896) *I. L. R.* 19 *Mad.* 422 (*Venganayyan v. Ramasami Ayyan*).

(3) 109 *P. R.* 1887 (*Kholas v. Kalyan Singh*).

In the present case I would adjourn proceedings to give the appellant opportunity of applying to the Divisional Judge for a certificate. If the Divisional Judge sees fit to give a certificate then I think the appeal should be heard, and not otherwise.

It is now much more than 30 days since the order of remand was passed, but I have no doubt the Divisional Judge would, in the peculiar circumstances of the case, not raise any difficulties on this point.

The judgment of Mr. Justice Shah Din was as follows :—

SHAH DIN, J.—I regret that I am unable to agree in my learned colleague's view that an appeal lies in this case under Order XLIII, rule 1 (u), of the Civil Procedure Code from the Divisional Judge's order of remand, provided that the appellant obtains from the Divisional Judge a certificate under section 40 (3) of the Punjab Courts Act (XVIII of 1884, as amended by Act I of 1912) regarding the question of custom involved in the preliminary point on which the decision of the Court of first instance has been reversed by the Divisional Judge. 7th April 1914.

The circumstances under which the present appeal has been preferred to this Court are fully set forth in the judgment of my learned colleague.

In the Court of first instance the parties joined issue on the question whether Amir, a Muhammadan, by caste, *chhimba*, whose alienations of ancestral land are in dispute in this case, was governed by his personal law or by the agricultural custom generally prevailing in this Province, according to which his power of disposition in regard to ancestral immovable property would be restricted. The first Court held that it had not been proved that Amir was governed by agricultural custom and that his power of alienation was restricted as alleged and it dismissed the suit of Amir's collaterals accordingly. On appeal the learned Divisional Judge came to the contrary conclusion, holding that in matters of alienation Amir was bound by the custom of agricultural tribes and that he could not alienate his ancestral land without legal necessity. He accordingly accepted the appeal and remanded the case for re-decision under Order LXI, rule 23, Civil Procedure Code.

The present appeal has been filed by the plaintiffs from the Divisional Judge's order of remand, under Order XLIII, rule 1 (u), of the said Code; and the question for decision

is whether under the provisions of the rule and order just cited an appeal lies to this Court from the Divisional Judge's order of remand.

According to rule 1 (*u*) of Order XLIII, an appeal lies from "an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the appellate Court ;" and it is clear that the order of the Divisional Judge remanding this case to the Court of first instance is appealable to this Court only if it can be affirmed that an appeal would lie from his decree in this case.

The right construction of the words "where an appeal would lie from the decree of the appellate Court" as used in clause (*u*) of rule 1 of the order under consideration appears to me to be a matter of some difficulty, and it is not easy to lay down a rule which would govern all conceivable cases falling within the purview of the clause in question. I am disposed to think that in this connection it would probably be a reasonable test to lay down that an appeal would lie under the said clause (*u*) from an order under rule 23 of Order XLI remanding a case where the party aggrieved by the order of remand would have the right of appeal if the appellate Court, instead of making the order of remand, passed a decree in that very proceeding reversing the decision of the first Court.

In other words, the test in any given case is whether an appeal would lie from the decree of the appellate Court if the order of remand made by it were itself treated as a decree and not a mere order within the meaning of section 2 of the Civil Procedure Code. I do not think that the word "decree" in clause (*u*) "means such *final* decree as might *ultimately* be "passed by the appellate Court," taking the words "final decree" to mean the decree which might be passed by the appellate Court on an appeal preferred to it by the aggrieved party from the decree passed by the first Court after the order of remand. *Prima facie* it is impossible to adopt a test of this kind in order to determine definitely, upon an appeal being preferred under Order XLIII, rule 1 (*u*), from an order of remand, whether the aggrieved party has the right of appeal or not ; and it is easy to conceive cases in which the adoption of this rule would defeat what I take to be the intention of the Legislature.

I agree with my learned colleagues that under the combined operation of the provisions of Order XLIII, rule 1 (*u*), Civil

Procedure Code, and section 40 of the Punjab Courts Act, there can be no appeal to this Court from a Divisional Judge's order of remand under Order XLI, rule 23, Civil Procedure Code, if that order is based upon a finding of fact only. Under section 588 (28) of the old Civil Procedure Code of 1882, read with the Punjab Courts Act, as it stood before it was amended by Act I of 1912, an unqualified right of appeal was allowed on questions of fact as well as on questions of law, according to the rulings of this Court (No. 109, *P. R.* 1887, p. 253 (1), and No. 1, *P. R.* 1903, *F. B.*, p. 2, last paragraph) (2) ; but with the enactment of rule 1 (u) of Order XLIII of the new Civil Procedure Code and with the recent amendment of the Punjab Courts Act, the law on this point has been changed ; and under the law as it now stands findings of fact embodied in the appellate Court's decision on the preliminary point in a case cannot be questioned upon an appeal under Order XLIII, rule 1 (u), Civil Procedure Code, for the simple reason that such findings cannot be disturbed on an appeal from the decree of the appellate Court.

But the decree which we have to look to in this connection is the decree which the appellate Court would be supposed to pass instead of making the order of remand on an appeal from the first Court's decision on the preliminary point, and not the " final decree " which the appellate Court might ultimately pass on an appeal preferred to it from the decree of the first Court subsequent to the order of remand.

A simple illustration will suffice to make my meaning clear.

Suppose in the present case the first Court had decided that the plaintiffs had no *locus standi* to sue because they had failed to prove that they are the collaterals of Amir and it had on this ground dismissed the suit. Suppose that on the plaintiffs' appeal the Divisional Judge were to decide that the plaintiffs are the collaterals of Amir ; upon this finding, which would be one of fact on a preliminary point, the Divisional Judge would reverse the decision of the first Court and remand the suit under rule 23 of Order XLI, Civil Procedure Code for a decision on the merits. Would the defendants have a right of appeal from the order of remand to this Court under Order XLIII, rule

(1) 109 *P. R.* 1887 p. 253 (*Khulus v. Kalyan Singh*).

(2) 1 *P. R.* 1903 (*F. B.*) p. 2 (*Maha Ram v. Ram Mahar*).

1 (u), Civil Procedure Code, seeing that the decision of the Divisional Judge on the preliminary point simply involved the decision of a question of fact and not of a question of law or custom ?

The answer to this question must be in the negative, although upon the trial of the case on the merits it might be found that various questions of law and custom (*e. g.* questions of estoppel, of Amir having or not having an unrestricted power of alienation, and of legal necessity, etc.), were involved in the case, and therefore a second appeal to this Court *might* lie under section 40 of the Punjab Courts Act from the final decree passed by the Divisional Judge on appeal from the second decree of the Court of first instance.

Now, let us take the converse case. Suppose the decision of the first Court was one dismissing the suit on the ground that it was barred by limitation (assuming that the question of limitation decided was a pure question of law) or on the ground that the matter in dispute was *res judicata* between the parties, and suppose that on appeal the Divisional Judge were to hold that the suit was not barred by the law of limitation or by the rule of *res judicata* and were to remand the case for a fresh decision on the merits. Under Order XLIII, rule 1 (u), Civil Procedure Code, an appeal would, in my opinion, lie to this Court from the order of remand, inasmuch as an appeal would lie if the order of remand, which involved the decision of questions of law, were treated as a decree finally disposing of the suit; although after the remand the first Court might dispose of the suit only on facts, in which case, on an appeal being preferred to it, the appellate Court would also have to record findings of fact only and dispose of the appeal on that basis. From the "final decree" of the appellate Court, based as it would be only on findings of fact, there would be no appeal to this Court; and yet in the view that I take of rule 1 (u) of order XLIII, Civil Procedure Code, an appeal would lie to this Court from the appellate Court's order of remand because the preliminary point involved questions of law and the decision on it would be open to second appeal if the order appealed from were a decree and not a mere order.

Applying to this case the test laid down above, it seems to me that an appeal would lie to this Court from the Divisional Judge's order of remand if the appellant, who is aggrieved by the said order, had an unqualified right of

appeal from the decree of the Divisional Judge in the event of that officer passing a decree in this very proceeding instead of making an order of remand.

In order to see whether he would have an unqualified right of appeal, we have to look to the special provisions of section 40 of the Punjab Courts Act, and looking to that section we find that, since the question involved in the preliminary point on which the decision of the first Court has been reversed by the Divisional Judge is, not a question of law, but a question of custom having the force of law, the appellant would have the right of appeal to this Court *only* if he were to obtain from the Divisional Judge a certificate in terms of sub-section (3) of section 40. If the Divisional Judge had passed a decree in this case instead of making the order of remand in question, the appellant would clearly not have been able to appeal to this Court without applying for and obtaining a certificate as aforesaid; the certificate might or might not have been granted by the Divisional Judge; and therefore the appellant would not have had an unrestricted right of appeal to this Court.

It is clear, therefore, that all that the appellant could predicate of his right of appeal, at the time when he filed the present appeal from the Divisional Judge's order of remand, was that an appeal *might* lie from the decree of the appellate Court, and this, in my opinion, is not sufficient to confer on him a right of appeal from the order of remand in question under Order XLIII, rule 1 (u), Civil Procedure Code. In order to claim that right the appellant should have been in a position to affirm definitely, when he filed his present appeal, that, upon the grounds urged by him, an appeal *would* lie under all circumstances from the decree of the appellate Court.

My learned colleague is of opinion that the appellant is entitled to appeal to this Court from the Divisional Judge's order of remand if he can obtain from that officer a certificate in terms of sub-section (3) of section 40 of the Punjab Courts Act. With all deference, I am unable to agree in this view. Section 40 aforesaid only relates to a second appeal to this Court from a *decree* passed in appeal by any Court subordinate to this Court, and the provisions of sub-section (3) of that section have no application whatever to an appeal from an order of remand such as the one under consideration in this case. It seems to me that when Order XLIII, rule 1 (u), Civil Procedure Code, was enacted by the

Indian Legislature, it did not contemplate the contingency of an appeal lying to this Court from the decree of a lower appellate Court upon the production by the appellant of a certificate such as is referred to in section 40 (3) of the Punjab Courts Act, which section was enacted by the Punjab Courts (Amendment) Act of 1912. The only provisions relating to appeals which the Legislature had apparently then in mind were those contained in section 100 to section 102, Civil Procedure Code. The certificate appeals (if the expression may be allowed) in this Province stand on a peculiar footing; and I do not think that such appeals really fall within the purview of the second part of clause (u) of rule 1 of Order XLIII, Civil Procedure Code.

Be that, however, as it may, it seems to me that we are not justified, for the purposes of a case of this kind, in reading the word "decree" in sub-section (3) of section 40 of the Punjab Courts Act, as if it included an "order" as defined in section 2, Civil Procedure Code. To read the word "decree" in the said sub-section in this sense would, in my opinion, lead to anomalous consequences when we bear in mind the two provisos to sub-section (3) and also the provisions as to limitation contained in section 43 of the same Act. The first proviso to sub-section (3) says that "an application (for a certificate) under sub-section (3) of the section shall not be received after the expiration of 30 days from the date on which the *decree* of the lower appellate Court was passed....." As in the present case no *decree* has been passed by the lower appellate Court, the limitation of 30 days as laid down in the proviso just cited would not apply to an application for a certificate by the aggrieved party.

Next, suppose that the aggrieved party were to apply for a certificate and that his application were to remain pending for more than 90 days, what would be the result? Under section 43 of the Act the period of limitation for an appeal from an order of remand, such as the one before us, is 90 days from the date of the order, and that section draws a clear distinction between a "decree" and an "order." Under the second proviso to sub-section (3) of section 40 the time during which the application under that sub-section has been pending must be excluded in computing the period for an appeal under sub-section (1), which clearly means an appeal from a "decree," and not an appeal from an "order"; and it follows that in a case where

a person aggrieved by an order of remand desires to appeal therefrom to this Court and makes an application for a certificate on a question of custom involved in the preliminary point the time during which his application remains pending cannot be excluded in computing the period of limitation prescribed for the appeal under sub-section (1) (c) of section 43. The period of appeal in such a case might therefore expire before a certificate is granted to the aggrieved party by the Appellate Court. These anomalous results can only be avoided if the word "decree" used in section 40 is read throughout as meaning indiscriminately a "decree" or an "order"; and I must say that, in my opinion, there is no warrant whatever for such a construction.

My learned colleague is prepared to place this construction upon the word "decree" used in the aforesaid section, and he further thinks that the Divisional Judge can grant a certificate on the question of custom involved, although the appeal to this Court is only from an order and not from a decree, and is not therefore covered strictly by the wording of sub-section (3) of section 40 aforesaid. According to him, section 40 "does not give the Divisional Judge the power "to give certificates (even in cases where decrees are passed), "for the simple reason that giving a certificate is not a matter "which would be illegal even without any provision of law." So, (says my learned colleague) "I do not think the Divisional "Judge would be in any way acting illegally if he were to "give a certificate for an appeal on a point of custom from an "order of remand."

My own view is that since, according to sub-section (3) of section 40, an aggrieved party who is desirous of appealing to this Court from an appellate decree regarding the validity or existence of any custom, has the right to apply to the appellate Court that passed the decree for grant of a certificate, that Court has by necessary implication, the power to give or to refuse to give the certificate applied for, and therefore the express conferment of such power on the appellate Court would have been superfluous, just as it would have been superfluous to enact a rule in Order XLV of the Civil Procedure Code expressly empowering the High Court to grant a certificate for permission to appeal to His Majesty in Council. But the case is entirely different when we have to deal with an appeal from an order of remand preferred under Order XLIII, rule 1 (u), Civil Procedure Code. Section 40 (3) of the Punjab Courts Act does not in terms apply

to such an appeal ; the party aggrieved by the order of remand cannot claim the right under the said section to apply to the appellate Court for a certificate on a point of custom involved in the preliminary point ; and as the appellate Court has not, by necessary implication, the power to grant a certificate to such an applicant, it would be perfectly within its rights in declining to adjudicate upon the application submitted to it.

My conclusion is that no appeal lies to this Court from the Divisional Judge's order of remand in this case, because it cannot be affirmed definitely that an appeal would lie from the decree of the Divisional Judge. The appellant could only appeal from the decree of the Divisional Judge upon the question of custom involved in the preliminary point if he obtained a certificate from that officer under section 40 (3) of the Punjab Courts Act ; but that section relates only to second appeals from " decrees," and not to " orders " such as the one appealed from in this case ; and the appellant has therefore no right to apply to the Divisional Judge for a certificate as if the order appealed from were a decree, nor has the Divisional Judge power to grant him the certificate if one were applied for. I would therefore dismiss this appeal.

I may note here that it has not been disputed before us by either side that the point on which the decision of the first Court was reversed by the Divisional Judge was a preliminary point within the meaning of Order XLI, rule 23, Civil Procedure Code, and that the order of remand made by the Divisional Judge is correct in form.

As there is a difference of opinion between us on a point of law, I would, if my learned colleague agrees, submit the case to the Hon'ble the Chief Judge with a request that the point may be referred to a third Judge for decision. The point of law may be stated as follows :—

Does an appeal lie to this Court under Order XLIII, rule 1 (u), Civil Procedure Code, from the Divisional Judge's order of remand in this case on the appellant producing a certificate from the Divisional Judge under sub-section (3) of section 40 of the Punjab Courts Act ? Does the sub-section in question apply to orders of remand made under Order XLI, rule 23, Civil Procedure Code, as well as to decrees ?

The further order of Mr. Justice Chevis was as follows :—

18th April 94.

CHEVIS, J.—Having read the opinion of my learned brother, and given further consideration to the case, I have changed my former opinion as regards the question whether the

appellant can apply to the Divisional Judge for a certificate. The provisions of section 40 (3) of the Punjab Courts Act certainly apply only to appeals from appellate decrees; I have never thought or said otherwise. Apart from section 40 (3) there is no provision of law regarding certificates, and I now think we should take it that such certificates can be given only for the purpose of lodging an appeal from an appellate decree.

I agree therefore with my learned brother that the appellant cannot ask the Divisional Judge for a certificate. I venture to think that in all other respects there is no material difference between us, and that there is therefore no longer any necessity for reference to a third Judge.

I would, if my learned brother agrees, hold that the order of remand in the present case is not open to appeal under Order XLIII, rule 1 (u), and I would dismiss this appeal with costs.

The final judgment of the Court was delivered by—

SHAH DIN, J.—In view of the fact that my brother Chevis 18th April 1914. has now agreed with me that no appeal lies to this Court from the Divisional Judge's order of remand, and that the appellant cannot ask for or obtain a certificate from the Divisional Judge under section 40 (3) of the Punjab Courts Act, there is no longer any necessity for a reference to a third Judge. I agree in dismissing the appeal with costs, and it is dismissed accordingly.

Appeal dismissed.

No. 86.

Before Hon. Mr. Justice Scott-Smith and Hon.

Mr. Justice Shadi Lal.

KARAR HASSAN—(DEFENDANT)—APPELLANT,

Versus

MUSTAFA HASSAN AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 575 of 1910.

Pensions Act, XVIII of 1871, sections 11 and 12—whether applicable to alienations made prior to the enactment—construction of statutes—retrospective effect—assignment of grant of land revenue—whether a pension.

Held, that it is now a well recognised canon of the interpretation of statutes that a legislative enactment is prospective and not retrospective in its operation, except (1) when the Act only affects the procedure of the Court and (2) when it appears clearly that the intention of the Legislature was to give a retrospective effect.

Held, consequently, that section 12 of the Pensions Act is not retrospective in its operation and does not therefore affect alienations of *jagirs* made before the Act came into force.

I. L. R. 7 All. 886 (1), overruling *I. L. R. 6 All. 630 (2)*, *I. L. R. 2 Bom. 294 (3)* and *I. L. R. 19 Bom. 250 (4)*, referred to.

Held also, that an assignment of a grant of land revenue is not prohibited by section 12, unless such grant comes within the meaning of the word "pension" and is made for the consideration specified in section 11.

27 P. R. 1878 (5), *57 P. R. 1884 (6)*, *133 P. R. 1888 (7)*.

Held further, that an assignment of land revenue may or may not be a "pension" within the meaning of sections 11 and 12, and the answer to the question must depend upon the facts of each case.

137 P. R. 1890 (8), *95 P. R. 1906 (9)* and *96 P. R. 1906 (10)*, referred to.

Held also, that as in this case the grant was of a fixed sum payable by the assignment of land revenue and was clearly made for political services it was a "pension" and came within the protection afforded by section 12

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Ambala, dated the 30th July 1909.

Lajpat Rai, for appellant.

Muhammad Shafi, for respondents.

The judgment of the Court was delivered by—

20th April 1914.

SHADI LAL, J.—This appeal arises out of a dispute between the descendants of two brothers, Sayed Rajab Ali and Sayed Rustam Ali. The plaintiffs, who are the descendants of Rajab Ali, sue Sayed Karar Hassan, son of Rustam Ali Khan, for the recovery of Rs. 817 on account of the *jagir* income for 1906 which has been realized by him and for a perpetual injunction restraining him from recovering the *jagir* money from defendants Nos. 2 and 3, the Lambardars of *mauza* Aligarh, whose duty is to realise the land revenue from the proprietors and pay it to the person entitled to the *jagir*.

It is not disputed that the *jagir* was granted to Rajab Ali for political services and after his death has continued

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- (1) 1885 *I. L. R. 7 All. 886* (*Imtiaz Begum v. Liakat-ul-Nisa*).
 - (2) 1884 *I. L. R. 6 All. 630* (*Imtiaz Begum v. Liakat-ul-Nisa*).
 - (3) 1877 *I. L. R. 2 Bom. 294* (*Jannadas v. Lalitaram*).
 - (4) 1891 *I. L. R. 19 Bom. 250* (*Dharam Das v. Hafasji*).
 - (5) *27 P. R. 1878* (*Bahadur Din v. Moti Lal*).
 - (6) *57 P. R. 1884* (*Kundan Lal v. Dalip Singh*).
 - (7) *133 P. R. 1888* (*Shankar Das v. Pasant Singh*).
 - (8) *137 P. R. 1890* (*Bodhray Shah v. Sirdar Amrikh Singh*).
 - (9) *95 P. R. 1906* (*Muhammad Qamar-ud-Din Khan v. Lachmi Nath*).
 - (10) *96 P. R. 1906* (*Qamar-ud-Din Khan v. Mami Ram*).

to be recorded in the names of his descendants. It appears that for nearly 50 years Rustam Ali Khan and Karar Hassan have been realizing the *jagir* but whether this was in pursuance of a transfer of the *jagir* by Rajab Ali to his brother or for some other reason, is a point at issue between the parties and has not been decided by the Courts below.

The defendant's contention is that in 1847 Rajab Ali transferred the *jagir* to Rustam Ali Khan in lieu of the transfer of *mauza* Mirpur and a share in a garden at Jagraon by the latter in favour of the former and that this exchange has all along been acted upon by the parties and their ancestors. This plea forms the subject-matter of issues Nos. 9 and 10 and has, as stated above, not been adjudicated upon by the lower Courts.

The suit of the plaintiffs has been decreed by the Courts below on the ground that the *jagir* in question, a political pension within the purview of section 12 of the Pensions Act, XXIII of 1871 and that the provisions of the Act apply to the transfer relied upon by the defendant. Any alienation, if made is, according to the lower Courts, void under section 12 and cannot be binding upon the plaintiffs. On appeal to this Court, the correctness of these findings has been impugned by the defendant Karar Hassan and we have listened to the arguments advanced by Mr. Lajpat Rai and Mr. Muhammad Shafi in support of their contentions.

The first point which requires decision is whether the provisions of the Pensions Act are or are not applicable to the alienation set up by the principal defendant.

On this point, we are of opinion that if the alienation took place before the date on which the Act came into force, it cannot be rendered invalid by invoking the aid of an enactment passed subsequent to the transaction. It is now a well recognised canon of the interpretation of statutes that a legislative enactment is prospective and not retrospective in its operation.

This rule admits of two exceptions: (1) when the Act only affects the procedure of the Court, and (2) when it appears clearly that the intention of the Legislature was to give a retrospective effect.

Now, section 12 of the Pensions Act which avoids an assignment of a pension does not contain a rule of procedure, and the sole question is whether there are words in the Act which show clearly that it was intended to apply

to contracts which were in existence at the date of its coming into force. We have read the section carefully and consider the arguments of Mr. Shafi and are unable to find any indication, much less a clear intention, that the section takes away vested rights. The construction contended for by the learned Counsel for the respondents would cause great inconvenience and injustice and give the section an operation which would deprive persons of the rights which vested in them long before the Act came into force. This would be manifestly unjust and contrary to the intention of the Legislature.

We are fortified in our view by the decisions of the Allahabad High Court in *I. L. R. VII All. 886* (1), which overrules an *ex parte* judgment of that Court in *I. L. R. VI All. 630* (2), and of the Bombay High Court in *I. L. R. II Bom. 294* (3), and *I. L. R. XIX Bom. 250* (4), which lay down the rule that the Pensions Act has not a retrospective operation.

In the absence of any other law rendering an assignment of *jagir* invalid we are clearly of opinion that the lower Courts are in error in holding that the alleged alienation in favour of the defendant's father, even if it took place before the Pensions Act came into force, was null and void. The issue as to the factum and the date of the alienation should be tried by the Court of first instance and if it be found that the alienation took place prior to the date of passing of the Pensions Act, the transaction must be regarded as valid.

The next question which we have to consider relates to the nature of the grant in favour of Rajab Ali. Suppose the transfer took place after the Pensions Act came into force; is it invalid under section 12? In other words, is it an assignment of a *political or service pension*?

We find that section 4 of the Act has a wide operation and includes within its scope not only a pension but also a grant of money or land revenue. The same is the case with sections 5 and 8. When we come to sections 11 and 12 we find no mention therein of grants of money or land revenue. A comparison of the wording of the different sections of the Act leads us to the conclusion that an assignment of a grant

- (1) (1885) *I. L. R. 7 All. 886* (*Imtiaz Begam v. Liakat-un-Nisa*).
- (2) (1884) *I. L. R. 6 All. 630* (*Imtiaz Begam v. Liakat-un-Nisa*).
- (3) (1877) *I. L. R. 2 Bom. 294* (*Jamnadas v. Lalitaram*).
- (4) (1894) *I. L. R. 19 Bom. 250* (*Dharam Das v. Hafasji*).

of land revenue is not prohibited by section 12, unless such grant comes within the meaning of the word "pension" and is made for the consideration specified in section 11.

The authorities quoted by the learned pleader for the appellant do not lay down the proposition that an assignment of land revenue can never be a pension for the purposes of sections 11 and 12.

In 27 P. R. 1878 (1), the assignment of land revenue was made to the custodian of a shrine for the benefit thereof and could not be a pension under sections 11 and 12, because the purpose for which it was made was not one of those specified in the sections.

The judgment in 57 P. R. 1884 (2), contains a *dictum* that income of a *jagir* is not protected from attachment either by section 266 (g) of the Civil Procedure Code or section 11 of the Pensions Act, but the *ratio decidendi* is not clear. To the same effect is the law laid down in No. 133 P. R. 1888 (3). In both these cases property sought to be attached was assigned land revenue and we have no hesitation in holding that a mere assignment of land revenue as such does not come within the protection given by sections 11 and 12, unless it fulfils other requirements of those sections.

The word "pension" has not been defined in the Act and we do not propose to lay down any definition which would be exhaustive. Ordinarily speaking "pension" involves the idea of a fixed periodical allowance or stipend and if it is granted on political considerations or for past services or as a compassionate allowance, it cannot be assigned. But a grant by Government does not, in our opinion, cease to be a pension because it takes the form of an assignment of land revenue (*vide* 137 P. R. 1890) (4).

In 95 P. R. 1906 (5), and 96 P. R. 1906 (6), the *jagir* income was held to be a pension and exempt from attachment in execution of a decree.

The principle which we deduce from the authorities cited before us is, that an assignment of land revenue by Government may or may not be a pension within the meaning of sections 11 and 12 and the answer to the question must depend upon the facts of each case

(1) 27 P. R. 1878 (*Baha-ud-Din v. Moti Lal*).

(2) 57 P. R. 1884 (*Kundan Lal v. Dalip Singh*).

(3) 133 P. R. 1888 (*Shankar Das v. Basant Singh*).

(4) 137 P. R. 1890 (*Bodhraj Shah v. Sirdar Amrikh Singh*).

(5) 95 P. R. 1906 (*Muhammad Qamar-ud-Din Khan v. Lachmi Nath*).

(6) 96 P. R. 1906 (*Qamar-ud-Din Khan v. Mani Ram*).

In the present case the material on the record does not give us sufficient information as to the origin and history of the grant. There is, however, one important document which throws a good deal of light upon the point before us. The *sanad* of 31st August 1868 in favour of Rajab Ali shows that the grant of Rs. 2,696 which was previously partly in perpetuity and partly for life was made wholly a perpetual grant for the future and payable by the assignment of the land revenue assessed on *mauzas* Tilondi Kalan and Aligarh. The grant was of a fixed sum and was clearly made for political services.

We, therefore, hold that the grant of the land revenue of *mauza* Aligarh, which is the subject-matter of the contest between the parties, is a political pension and comes within the protection afforded by section 12.

The plea of estoppel raised for the appellant has no application to the present case and must be overruled.

As the decisions of the lower Courts have proceeded upon assumptions of facts and as there has been no proper trial of the suit, we must set aside the judgments and decrees of the Courts below and remit the case for rededecision.

We, therefore, accept the appeal, set aside the decrees of the lower Courts and direct the Court of first instance to decide the case with reference to the foregoing remarks. The Court-fee on the appeals to this Court and the Divisional Court shall be refunded and other costs shall be costs in the cause.

Appeal accepted.

No. 87.

*Before Hon. Mr. Justice Johnstone and Hon. Mr.
Justice Shadi Lal.*

RATTI RAM AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

KUNDAN LAL AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 41 of 1911.

Jurisdiction—territorial—suit tried in wrong place—plea of want of jurisdiction, how dealt with in appellate Court—Civil Procedure Code, 1908, section 21.

Plaintiffs, the members of a Firm at Lyallpur, sued defendants, the members of a Firm at Karachi, for Rs. 5,669, as balance due to them on account of certain transactions connected with the sale of goods by the

defendants as plaintiffs' commission agents. The plaintiffs alleged that the agreement as to the defendants acting as their commission agents at Karachi had been come to orally at Lyallpur and their suit was consequently brought there. The Lyallpur Court found that it had jurisdiction to try the case.

Held, by the Chief Court on appeal, that plaintiffs had failed to prove that the alleged agreement had been entered into at Lyallpur and that consequently the lower Court had not jurisdiction to try the case.

Held, however, that although the suit was instituted in 1906, section 21 of the Code of Civil Procedure 1908 was applicable to the appeal and finding that there had been no failure of justice, the objection as to the place of suing was disallowed and the decree of the lower Court upheld.

I. L. R. 22 Cal. 767 (779) (F. B.) (1), referred to.

First appeal from the decree of A. H. Brasher, Esquire, District Judge of Lyallpur, dated the 5th day of December 1910.

Muhammad Shafi, for appellants.

Sheo Narain, for respondents.

The judgment of the Court was delivered by—

SHADI LAL, J.—This appeal arises out of a dispute between *27th April 1914.* two mercantile firms in respect of money due on certain transactions between them. The plaintiffs carry on their business at Lyallpur under the name and style of "Sheo Karan Das" and the defendants' firm called "Ratti Ram Ram Bhagat" have their business at Karachi. It appears that the plaintiffs were employed to purchase goods at Lyallpur as commission agents of the defendants and send them to the latter at Karachi. The present suit, however, relates entirely to transactions connected with the sale of goods at Karachi by the defendants as plaintiffs' commission agents.

According to the plaintiffs these transactions began in pursuance of a contract which was entered into at Lyallpur at the time of the visit of Daya Mal, one of the defendants, when it was agreed that the plaintiffs would send their goods to the defendants at Karachi and the latter after deducting the commission money due to them would remit the balance of the price to the former at Lyallpur.

The plaintiffs claimed that the amount to which they were entitled as the result of the account between the parties was Rs. 5,669-12-0 and filed a suit for the recovery thereof. The defendants though admitting the sale of the plaintiffs' goods as commission agents, denied the

(1) (1895) *I. L. R. 22 Cal. 767 (779) (F. B.) (Jogdhanund Singh v. Amrita Lal)*.

formation of the contract at Lyallpur and pleaded that the Court there had no jurisdiction to try the suit. They also disputed the correctness of the amount sued for by the plaintiffs and claimed set off for certain items which were not admitted by the other side. The District Judge, Mirza Zafar Ali, decided, by an order, dated the 24th August 1906, that the Lyallpur Court had jurisdiction to try the suit and his successor, Mr. Brasher, passed on the 15th December 1910 a decree for Rs. 4,416-7-0 in favour of the plaintiffs.

The defendants have preferred an appeal to this Court and the plaintiffs have filed cross-objections against the findings of the District Judge as to certain items disallowed by him. In the appeal, the main question for decision is whether the District Judge of Lyallpur was competent to try the suit and, if not, whether the decree should be set aside on the ground of defect of territorial jurisdiction and the plaint returned to the plaintiffs for presentation to the proper Court.

It is clear that the sole reason for instituting the suit in the Lyallpur Court is the contract of agency alleged to have been entered into between the plaintiffs and Daya Mal at the former's shop at Lyallpur. It is not disputed that Daya Mal was at Lyallpur on or about the date of the alleged contract, but the defendants deny the formation of any such contract.

We have, therefore, to see whether the plaintiffs have succeeded in establishing their contention. The contract was not reduced to writing and the evidence in support of it consists of the statements of Sheo Narain, one of the plaintiffs, Dewan Chand and Ramji Lal. But Sheo Narain admits that during the period when the goods were consigned to Karachi the plaintiffs had at that place at first their servant Bansi Lal and subsequently their partners Ram Rattan and Hira Lal. He further admits that at least some of the consignments were sent to Hira Lal and not to the defendants. If the defendants had been appointed commission agents on the terms alleged by the plaintiffs the consignments should have, in our opinion, been sent to the defendants. These admissions lend colour to the defendants' contention that the contract of the agency was made by Hira Lal at Karachi and that he received the goods and arranged for their sale through the agency of the defendants.

We have read the evidence of Diwan Chand and Ramji Lal and consider it unreliable and wholly insufficient to prove the contract set up by the plaintiffs. The letter

referred to in the order of the District Judge by which the defendants offered to remit to plaintiffs the price of goods in advance does not appear to apply to the transactions in dispute. The plaintiffs allege that, in pursuance of the contract, accounts were submitted to them at Lyallpur by the defendants and this allegation if substantiated would be a strong piece of evidence in favour of the plaintiffs' contention. But the learned Advocate for the respondents admitted that he was unable to cite any evidence in support of it. It was pointed out to him, that if the defendants became the agents of the plaintiffs from the date of the contract as alleged in the plaint there would be entries in the account books of the plaintiffs showing the payment or credit of commission fee to the defendants and that entries of that character would, if proved, be of great help in proving the contract relied upon by the plaintiffs. He, however, expressed his inability to show us any entries relating to commission because he said he had not studied the accounts.

There is, therefore, absolutely no documentary evidence to prove the contract which is the basis of the jurisdiction of the Lyallpur Court and the oral evidence is in our opinion interested and unreliable. It is wholly insufficient to prove the alleged contract.

We must, therefore, hold that the plaintiffs have not relieved themselves of the burden which rested on them to prove the existence of the contract which brought this suit within the cognizance of the Lyallpur Court and that that Court had not the territorial jurisdiction to adjudicate upon the claim of the plaintiffs.

What then is the effect of this finding on the proceedings taken in the Lyallpur Court? If we were to answer this question by reference to the Civil Procedure Code of 1882 we would have no hesitation in holding that the proceedings are *coram non judice* and must be set aside and the plaintiffs must be told to go to the proper Court to get an adjudication of their claim.

There is, however, an important provision of law introduced for the first time in the Code of 1908 which has a direct bearing upon the issue before us. But the first point which we have to determine is whether this law which came into force on the first of January 1909 can affect a case which was instituted in 1906, *prior* to the date on which the new Code came into operation.

Section 21 of the Civil Procedure Code, 1908, which contains the law referred to above, runs as follows :—

“No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice.”

Now the wording of this section clearly shows that it lays down a rule for the guidance of only the appellate or revisional Court and does not influence the Court of first instance in its decision on the question of territorial jurisdiction. When the original Court has given its finding on the matter of jurisdiction and it is re-agitated before a Court of appeal or revision, then the latter Court shall have to consider whether the defect of jurisdiction should or should not be cured by applying its provisions.

If, for instance, the plaintiff institutes a suit in the Court of a particular district and fails to substantiate the allegation bringing his case within the cognizance of that Court, the latter cannot, then, invoke the help of section 21 and proceed to hear and determine the suit. In the same way the appellate Court, if it concurs with the Court of first instance in its finding on jurisdiction adverse to the plaintiff, cannot use the provisions of the section for the purpose of conferring jurisdiction on the original Court and remand the case for decision on the merits.

If, on the other hand, the Court of the first instance holds that it has jurisdiction and proceeds to decide the suit on the merits and the appellate or revisional Court finds the first Court, though otherwise fully competent to hear the suit, had not the territorial jurisdiction over it, then it has to consider whether the defect can be condoned by applying the principle laid down in section 21. It will, thus, be observed that the only case in which the question of the applicability of the section arises is when the first Court after giving a finding in the affirmative on the point of jurisdiction decides the case on the merits and the appellate or revisional Court disagrees with that finding and that the section is meant solely for the guidance of the latter Court. It does not profess to confer jurisdiction on the original Court but it empowers the higher Court to validate certain proceedings which would otherwise be invalid.

The object of the legislature in enacting this salutary principle of law is that when the Court of first instance after

giving an affirmative finding on jurisdiction takes proceedings on the merits of the case the latter should not be rendered abortive and all the time and labour spent thereon should not be wasted simply by reason of the fact that the higher Court comes to a contrary finding on the preliminary point of jurisdiction. A similar provision will be found in section 11 of the Suits Valuation Act which is intended to cure the defect of jurisdiction arising from under-valuation of suits or appeals.

Having held that section 21 of the Code of 1908 is intended for use by the appellate or revisional Court, we are not aware of any canon of the interpretation of statutes which will exclude its operation in the present appeal. It is true that the suit was instituted before the Code came into force but the decree appealed against was passed after it had come into operation. The section was clearly in existence when the appeal was instituted in this Court and it is in existence when the appeal comes on for hearing before us. Are we then sitting as a Court of appeal, for whose guidance the section was enacted, justified in ignoring its provisions on the sole ground that the litigation commenced in the first Court prior to the date of its coming into operation?

It is a well-known rule of law that no person has a vested right in the course of procedure and there is a general principle of the construction of statutes that alterations in the procedure are always retrospective unless there be some good reason against it. There can be no objection to their having effect immediately even though they should affect past transactions and the mode of enforcement of vested rights; *vide I. L. R. XXII Cal. 767*, (at page 779) (*F. B.*) (1). We see no valid reason why the Code should not apply to pending proceedings and must, therefore, hold that the present appeal is not excluded from the operation of section 21.

We, now, proceed to consider whether the appellants have fulfilled both the requirements of the section which are *a sine qua non* to the success of their objection as to the place of suing. We find that the objection was taken before the settlement of issues and that the first condition has therefore been complied with. But we cannot, in the present case, see any failure of justice on account of the suit having been instituted in the Lyallpur Court. The only prejudice alleged by the learned counsel for the appellants is that his clients

(1) (1895) *I. L. R.* 22 *Cal.* 767 (779) (*F. B.*) (*Jogodanuud Singh v. Amrita Lal*).

have not been able to produce certain evidence which they would have done if the suit had been heard by the Karachi Court. The non-production of evidence was, as will be seen later, due to their negligence and cannot, in our opinion, be attributed to the change of *forum*. Our conclusion, therefore, is that though the Lyallpur Court had not the jurisdiction to hear the suit, the objection as to the place of suing cannot be allowed because there has been no consequent failure of justice.

Upon the merits of the case there is not much to be said. The learned counsel for the appellants expressly gave up ground 4 of the appeal and confined his argument to the question of remand for further evidence to enable his clients to prove the items claimed by them by way of set-off. The proceedings on pages 88 and 89 of the printed record show that the plaintiffs closed their evidence on the 26th of January 1910 and that the defendants-appellants were ordered on that day to produce their evidence at the next hearing. Repeated adjournments were subsequently granted to them to produce their witnesses but they did not examine a single witness. The learned District Judge was, in these circumstances, compelled to pass an order on the 11th of November 1910 refusing any further adjournment of the case for the defendants' evidence.

On these facts we have no hesitation in agreeing with the learned Judge of the Court below that the delay was due to the negligence of the defendants. We entertain no doubt that they, if so advised, could have easily produced their account-books in support of their claim of set-off and also their witnesses, the majority of whom were either their relatives or their servants. They wanted to delay the decision of the suit and their conduct amounted to an abuse of the process of the Court.

We cannot, therefore, pass an order which will encourage litigants in adopting tactics of this kind and must, therefore, decline to remand the case for recording the evidence of the defendants. This concludes the appeal and as the decree of the District Judge has not been disturbed the appeal fails and is hereby dismissed.

The cross-objections by the respondents have not been argued before us and we must, consequently, reject them. Taking all the circumstances into consideration we order that the parties do bear their own costs in this Court.

Appeal dismissed.

No. 88.

*Before Hon. Mr. Justice Scott-Smith and Hon. Mr. Justice
Shadi Lal.*

MED SINGH AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

MUSSAMMAT KABIR-UN-NISA—(PLAINTIFF)—
RESPONDENT.

Civil Appeal No. 116 of 1912.

*Civil Procedure Code, 1908, order 21, rule 2, and order 41, rule 4—
decree against defendants on ground common to all—appeal by all
defendants—death of one of them—failure to bring his representative on
record within limitation—abatement.*

A number of defendants against whom a decree had been granted by the lower Appellate Court instituted an appeal to the Chief Court. One of them subsequently died and no application was made to bring his representatives on the record until after the period of limitation had expired. The decree proceeded on a ground common to all defendants—

Held that, as under Order 41, rule 4 of the Code of Civil Procedure, it was open to any one of the defendants to appeal to the Chief Court against the decree of the lower Appellate Court and the Court would have been empowered to reverse or modify the decree in favour of all the defendants, abatement of the appeal in respect of one of the appellants did not involve the dismissal of the appeal of the remaining appellants.

I. L. R. 22 Bom. 718 (1), I. L. R. 27 Bom. 284 (2) and I. L. R. 25 All. 27 (3), referred to.

*Further appeal from the decree of Khan Bahadur Pirzada Manvi
Muhammad Hussain, M. A., Divisional Judge, Hissar Division,
dated the 23rd November 1911.*

Gokal Chand, for appellants.

Sundar Das, for respondents.

The judgment of the Court was delivered by—

SHADI LAL, J.—The plaintiff who is recorded in the revenue papers an occupancy tenant of the land in dispute has brought the present suit against the recorded proprietors for a declaration that she is owner of land and that the entry in the revenue papers giving her the *status* of occupancy tenant is incorrect. 27th April 1914.

The Court of first instance dismissed the suit, but it was decreed on appeal by the Divisional Judge. The

(1) (1897) *I. L. R. 22 Bom. 718* (*Chandarsang v. Khimabhai*).

(2) (1903) *I. L. R. 27 Bom. 284* (*Chintaman Nilkant v. Gangabhai*).

(3) (1902) *I. L. R. 25 All. 27* (*Ram Sewak v. Lambar Pande*).

defendants who are more than thirteen in number have preferred a further appeal to this Court and Mr. Sundar Das on behalf of the respondent has raised a preliminary objection to the hearing of the appeal that as the application to bring on the record the representatives of Hira was made after the expiry of six months from the date of his death the appeal has abated.

It appears from the copy of an extract from the death register that Hira died on the 4th April 1912 and the application to implead his heirs was not made till the 30th May 1913. On these facts, it is clear that the appeal abates so far as the deceased Hira is concerned and the question arises whether this partial abatement involves the dismissal of the appeal of the remaining appellants.

Now, Order XLI, rule 4, provides that when the decree appealed from proceeds upon a ground common to several plaintiffs or defendants, any one of them may appeal from the whole decree and the Appellate Court may, thereupon, reverse or vary the decree in favour of all the plaintiffs or the defendants. The decree in the present case undoubtedly proceeds upon a ground common to all the defendants, and it was therefore open to any one of them to appeal against it, and this Court would have been empowered to reverse or modify the decree in favour of all the defendants. The fact that all the defendants preferred a joint appeal does not in our opinion make any difference.

If each of the surviving appellants could have appealed separately and asked this Court to interfere with the entire decree of the lower Court we fail to see why the fact that he chose to join with others in filing one appeal should put him in a worse position. The partial abatement does not, therefore, produce any prejudicial effect and the appeal can proceed as if Hira had not been an appellant from the very beginning. This view of the law is in accordance with the judgments of the Bombay and Allahabad High Courts in *I. L. R.* 22 Bom. p. 718 (1); 27 Bom. p. 284 (2) and 25 All. p. 27 (3).

We therefore have no hesitation in overruling the preliminary objection.

The remainder of the judgment is not required for the purpose of this report.—[Ed.]

Appeal accepted.

1. 1897 *I. L. R.* 22 Bom. 718 (*Chandarsang v. Khimabhai*).

2. 1903 *I. L. R.* 27 Bom. 281 (*Chintaman Nilkant v. Gangabhai*).

3. 1902 *I. L. R.* 25 All. 27 (*Ram Sewak v. Lambar Pandé*).

No. 89.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

NABI BAKHSH—(PLAINTIFF)—APPELLANT,

Versus

MUSSAMMAT MEHR BIBI—(DEFENDANT)—
RESPONDENT.

Civil Appeal No. 882 of 1912.

Custom—alienation—gift of land in equal shares to several persons—whether joint tenancy with succession to survivor—reversion on death of donee to agnatic heirs of donor—distant collaterals whose suit for declaration in regard to gift was rejected—suit for possession after death of donee without lineal descendants—adverse possession.

In or about the year 1865 one D. made a gift of the whole of his landed property in equal third shares to (1) his daughter J. (2) L. D. the son of J. and (3) K. the son of his other daughter K. B. (who had died prior to the date of gift). These gifts were unsuccessfully challenged by D's collaterals, their suit being dismissed on the ground that they were too remotely related to the donor to contest his action. D. died in 1870 and L. D. in 1877. The latter left no issue and the third share gifted to him passed on his death to his mother J. Upon the death of J. the collaterals brought the present suit in which they claim to recover the lands gifted to J. and her son L. D. from the widow of a son of the husband of J. by another wife, on the ground that on the death of J. and L. D. without lineal descendants the property reverted by customary law to the agnatic heirs of the donors.

Held, that the gift by D. did not establish a joint tenancy with remainder to the survivor and plaintiffs' suit was therefore not barred by reason of one of the donees, *viz.*, K., being alive.

Held also, that a joint tenancy is an estate of a highly technical nature of English conveyancing and that its principles appear to be unknown to the personal law of the parties.

I. L. R. 23 Cal. 670 (679) (P. C.) (1), referred to.

Held further, that the decision in the previous suit for a declaration did not debar the plaintiffs from claiming possession of the land gifted to J. and her son L. D. on death without lineal descendants, and that the possession of J. of L. D.'s land was not adverse to plaintiffs.

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Sialkot, dated the 11th May 1912.

Devi Dial and Ahmad Hussan, for appellant

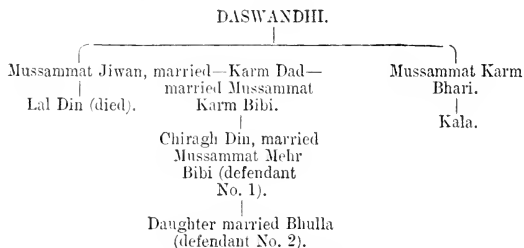
G. C. Narang, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—The full pedigree table is given in the *8th May 1914*, judgment of the learned Divisional Judge, but the following

(1) (1896) *I. L. R. 23 Cal. 670 (679) (P. C.) (Jogeswar v. Ram Chandra)*.

sufficiently explains the relationship of the parties for the purpose of this appeal : —



Karm Dad, the husband of Mussammat Jiwan, had a second wife, Mussammat Karm Bibi, by whom he had a son, Chiragh Din. The latter died in 1895, leaving a widow, Mussammat Mehr Bibi (defendant No. 1), and a daughter married to Bhulla (defendant No. 2). About the year 1865 Daswandhi made a gift of the whole of his property, in equal third shares, to (1) his daughter, Mussammat Jiwan, (2) Lal Din (the son of Mussammat Jiwan), and (3) Kala (the son of his daughter, Mussammat Karm Bhari who had died prior to the date of the gift). These gifts were unsuccessfully challenged by Daswandhi's collaterals, their suit being dismissed on the ground that they were too remotely related to the donor to contest his action. Daswandhi died in 1870, and Lal Din in 1877. The latter left no issue and the third share gifted to him passed on his death to his mother, Mussammat Jiwan.

Upon the death of Mussammat Jiwan the collaterals of Daswandhi brought the present suit in which they claim to recover the lands gifted to Mussammat Jiwan and Lal Din, from Mussammat Mehr Bibi, who is in present possession. The ground upon which the claim is based is that the gift to Mussammat Jiwan and her son enured only for the benefit of the donees and their lineal descendants, and that as neither Lal Din nor Mussammat Jiwan had left any such issue surviving, the property reverted, under the well recognised and general rule of customary law, to the agnatic heirs of the donors.

The defendants impleaded were Mussammat Mehr Bibi (the widow of Chiragh) and Bhulla, the husband of her deceased daughter, and their defence to the suit was two-fold. In the first place, they pleaded that Mussammat Jiwan had in her life-time adopted Chiragh Din (the son of her husband by her

co-wife) and that consequently Chiragh Din's widow, Mussammat Mehr Bibi, was entitled to hold possession for her life, and in the second place, that Bhulla was also one of Daswandhi's collaterals and that in his presence plaintiffs had no right to sue for possession.

These were the only pleas urged by defendants, and the District Judge decided both in favour of plaintiffs. Bhulla accepted this decision and preferred no appeal to the Divisional Judge, but Mussammat Mehr Bibi did appeal and urged that plaintiffs' claim to Lal Din's share was time-barred, that Mussammat Jiwan and Lal Din had paid off certain mortgage charges and that consequently plaintiffs could not recover the land without paying defendant, who was the representative of Mussammat Jiwan and Lal Din, the said amount, and that Chiragh Din had been proved to be the adopted son of Mussammat Jiwan.

There was obviously no force in any of these contentions. Mussammat Jiwan, as the mother of Lal Din, would in the natural course of things be allowed by the collateral heirs of Daswandhi, to enjoy for her life the property given to her son, and her possession of it was clearly permissive and in no sense adverse to plaintiffs. Nor again would any adoption by her or Chiragh Din (a total stranger to the family of Daswandhi) have had the effect of making him her heir to the prejudice of her father's agnatic heirs.

As a matter of fact, the District Judge has found, and quite rightly, that there is no evidence whatever to support the allegation that Mussammat Jiwan adopted the son of her co-wife, but even if she had done so, it is clear that her action could not possibly have affected plaintiffs' rights to succeed by reversion on failure of her lineal descendants.

The plea that Mussammat Mehr Bibi was entitled to be reimbursed for moneys paid by Mussammat Jiwan to redeem certain mortgages is a mere after-thought and utterly untenable in any event. Chiragh Din and his widow are not the heirs of Mussammat Jiwan, and apart from the objection that there is no proof that Mussammat Jiwan spent any money in redeeming mortgages on the land in suit, Mussammat Mehr Bibi would have no right to claim compensation for any such expenditure, had it been established. So far as Mussammat Mehr Bibi's own pleadings and grounds of appeal were concerned, there can be no doubt

that her defence to the claim must have failed and the decree of the District Judge has been upheld.

But the Divisional Judge set up an entirely new case for her, and himself evolved a line of defence which has never suggested itself to either defendants or their legal advisers. He has assumed, in the absence of any evidence and purely on what he regards as probabilities, that Daswandhi when he made the gift to the three donees in 1865 "intended to "give them a joint tenancy, with remainder to the survivor "or her issue in the event of the descendants of either "becoming extinct." Having assumed this fact, and having given Daswandhi the credit for creating an estate of a highly technical nature, an estate probably unknown to the personal law of Daswandhi (*Jogeswar v. Ram Chandra, I. L. R. 23 Cal. p. 679, P. C.*) (1), and most assuredly unknown to Daswandhi himself, the learned Judge, in defiance of the pleadings and the facts upon the record, proceeds to import into the case a highly technical rule of English conveyancing and to hold that Kala the sole surviving donee under Daswandhi's gifts, is in law the rightful heir, by survivorship, to Mussammat Jiwan and that as long as he lives, plaintiffs can have no *locus standi* to sue for possession of any part of the property originally given by Daswandhi. Upon this extraordinary ground, the learned Judge has dismissed plaintiffs' suit and has brushed aside, as a matter of no possible moment, the very important fact that Kala has never asserted any right to the property in suit. He has, further, completely ignored the actual pleadings of the parties and has dismissed the suit by applying to it a technical rule of English conveyancing, (and that too erroneously), without giving the plaintiffs an opportunity of showing that Daswandhi, an uneducated Punjab agriculturist, could not possibly have had that rule in his mind when he made the gifts, in distinct shares, to the three donees. Had plaintiffs had this opportunity, they could have pointed to the fact that when Lal Din died, Kala did not take a half share with Mussammat Jiwan in the deceased's property, whereas if the Divisional Judge's view is correct, Kala and Mussammat Jiwan must have succeeded jointly to Lal Din's property.

We must further take exception to the remarks of the Divisional Judge when he says that the gift to Mussammat

L (1) (1896), *I. L. R. 23 Cal. 670 (679) (P. C.) (Jogeswar v. Ram Chandra)*.

Jiwan stands as it did when the collaterals originally sued to have it set aside, and that it cannot be impugned now any more than it could be then. Plaintiffs do not now impugn the gift. Their contention is that the donees (Mussammat Jiwan and Lal Din) have since that litigation died without issue and that under the ordinary rule of customary law, the property reverts to them as the ultimate heirs of the donors. It is idle, therefore, for the learned Judge to observe that what was done and decided in the former case cannot now be undone. Plaintiffs do not ask for anything to be undone. They accept the previous decision but allege that facts are now entirely different, and obviously their contention is correct.

In the circumstances it is to be regretted that the Divisional Judge went out of his way to assert that it was "deplorable that plaintiffs should be induced to file suits like this and waste money on them because their legal advisers do not grasp the elementary principles of law," and to stigmatise this as "a meddlesome suit." These observations were most unfair to plaintiffs and their legal advisers and were quite uncalled for and unjustifiable.

In our opinion, plaintiffs were fully justified in preferring their present claim, and their suit must have succeeded had the learned Judge himself adjudicated upon it in the ordinary way and with reference to elementary principles of pleading.

We accept the appeal and, setting aside the decree of the Divisional Judge, we restore that of the District Judge. Respondent must pay costs throughout.

Appeal accepted.

No. 90.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

NATHIA SINGH—(DEFENDANT)—APPELLANT,

Versus

MANGAL AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 875 of 1911.

Custom—adoption—sister's son—Bajwa Jats, Nikodar tahsil, Jullundur district.

Held, that it had not been proved that by custom among Bajwa Jats, Nikodar tahsil, Jullundur district, the adoption of a sister's son was valid and that the *onus* of proving its validity was upon the latter.

50 P. R. 1893 (F. B.) (1) and Civil Appeal No. 118 of 1891 (unpublished) referred to.

Further appeal from the decree of I. H. Leslie-Jones, Esquire, Divisional Judge, Jullundur Division, dated the 9th May 1911.

Duni Chand and Badr-ud-Din, for appellant.

Asquith, for respondent.

The judgment of the Court was delivered by—

14th May 1914.

RATTIGAN, J.—The parties are Bajwa Jats of Nikodar *tahsil*, Jullundur district. Plaintiffs who are the collaterals in the fourth degree of one Sawan, deceased, sue for possession of the land left by the deceased on the allegation that the defendant Natha Singh, the son of Sawan's sister, took possession thereof upon his uncle's decease and had mutation effected in his name. The defendant pleaded that the land in dispute had not descended from an ancestor common to the plaintiffs and Sawan; that Sawan had adopted defendant in his infancy and brought him up as a son; and that in addition Sawan shortly before his death had made a gift of his property to defendant.

The Subordinate Judge held that the property was ancestral; that plaintiffs were related to deceased in the fourth degree; that an adoption had in fact taken place though in all probability, only shortly before the execution of the deed of adoption which was dated the 17th March 1909; that the said adoption was invalid by custom, and finally that the alleged gift in favour of defendant had not been proved. He, accordingly, granted plaintiffs the decree prayed for.

The Divisional Judge on appeal agreed with the Subordinate Judge that the gift had not been proved and that the alleged adoption, even if it took place in fact, was contrary to custom and invalid. He, accordingly, (without coming to any finding as to whether the property was ancestral or whether an adoption had in fact taken place), dismissed defendant's appeal.

A further appeal has been filed by the defendant in this Court, and the main contention urged on his behalf is that there is no proof that the land in question is ancestral *qua* the plaintiffs and that as a result, the mere fact of his adoption would suffice to oust the plaintiffs, who in the event of the property being self-acquired, would have no *locus standi* to contest the validity of the adoption.

After hearing lengthy arguments, we are of opinion that plaintiffs have succeeded in showing that the land in suit originally descended from the common ancestor, Gola, who founded the village very many years ago. The

statement made by the proprietors of the village in 1885 at the time of settlement is conclusive upon this point. They then asserted that the village had been founded by their ancestor, Gola, and that the lands held by them had descended from him, though in the course of time various branches of the family had divided areas *inter se*. The presumption then is that this land, which was originally ancestral, has continued to bear the same character and it was for the defendant to prove that it had lost that character. He has not been able to show that it has ever passed out of the hands of the descendants of Gola, and in these circumstances we must hold that the first Court's finding is correct and that the land is ancestral.

Upon this finding it is hardly necessary for us, in face of the Full Bench ruling No. 50 *P. R.* of 1893 (1), to add that the *onus* of proving that Bajwa Jats of Jullundur District recognise the validity of the adoption of a sister's son lay very heavily upon the defendant. The instances cited by him are mostly irrelevant and those that are in point date from a time long since past and it is impossible to obtain full details with regard to the circumstances surrounding them. In the case of Amru, for instance, he is said to have given three-fourths of his land to his daughter before the first settlement, but we have no particulars as to whether there were any reversioners or whether they consented to the gift. The other instance relates to a case of a daughter's son and was decided so long ago as 1863. On the other hand, in addition to the Full Bench ruling cited, we have a comparatively recent decision (Civil Appeal No. 418 of 1894) by a Division Bench of this Court to the effect that the adoption of a sister's son, or a gift to such a person, is not allowed by custom of the Hindu Jats of the Jullundur District.

Upon these authorities we agree with the Courts below that the adoption, if it took place in fact, was contrary to custom and that defendant had no right to the land for which plaintiffs have brought the present suit. The appeal is consequently dismissed with costs.

Appeal dismissed.

No. 91.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice
Scott-Smith.

DEVI DAS AND OTHERS—(PLAINTIFFS)—APPELLANTS,
VERSUS
RAJA KHAN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1648 of 1912.

Hindu Law—sale by widow of her husband's land with consent of nearest reversioner—suit by more distant reversioners challenging the sale.

Mussammat L., widow of one K. C., deceased, and S. D., first cousin of K. C., sold a portion of the land left by him to R. K.—Plaintiffs, who were more distant reversioners of K. C., brought the present suit for a declaration that the sale shall not affect their reversionary rights after the widow's death. The first Court held that, although the land was not ancestral *qua* the plaintiffs, they, as collaterals of K. C., could contest the sale by his widow, that the sale was not for legal necessity, and that it was not validated merely by the consent of S. D., who was the nearest reversioner at the date of sale. On appeal the Divisional Judge agreed with the first Court that plaintiffs were the collaterals of K. C. and that the sale was not for legal necessity, but held, differing from that Court, that as the nearest reversioner of K. C. had consented to the sale, the plaintiffs could not challenge it.

Held, that an alienation by a Hindu widow of her deceased husband's estate without justifying legal necessity is not validated by the consent of the nearest reversioners, unless

(a) in a case in which the alienation relates to a portion of the estate, it is found on the facts of the case that such consent gives rise to a presumption either of the existence of necessity or of reasonable inquiry and honest belief as to its existence or

(b) in a case where the alienation is of the *whole* estate, the consent is capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and consequent acceleration of the interest of the consenting heirs.

The case was remanded to the lower Appellate Court for re-decision in accordance with the above principle.

I. L. R. 30 All. 1 P. C., 1, explained. *I. L. R. 40 Cal. 721 (F. B.)* (2) followed and *I. L. R. 6 All. 116 (F. B.)* (3), *I. L. R. 10 Cal. 1102 (F. B.)* (4), *I. L. R. 17 Cal. 896* (5), *I. L. R. 21 Mad. 128* (6), *I. L. R. 25 Bom. 129* (7), *I. L. R. 31 Mad. 366 (F. B.)* (8), *I. L. R. 32 All. 176* (9), *I. L. R. 34 All. 129* (10), *I. L. R. 34 Bom. 165* (11), 13; *B. L. R. 940* (12), 14 *B. L. R. 602* (13)

1. (1907, *I. L. R. 30 All. 1 (P. C.)* *Bajrangji Singh v. Manokarnika*).
2. (1913) *I. L. R. 40 Cal. 721 (F. B.)* (*Devi Prasad v. Golap Bhagat*).
- (3) (1883, *I. L. R. 6 All. 116 (F. B.)* (*Ramphal Rai v. Tula Kuari*).
4. (1884, *I. L. R. 10 Cal. 1102 (F. B.)* (*Nobokishore v. Hari Nath*).
- (5) 1890 *I. L. R. 17 Cal. 896* (*Radha Shyam v. Joy Ram*).
- (6) 1897, *I. L. R. 21 Mad. 128* (*Marudamuthu v. Srinivasa Pillai*).
- (7) (1900, *I. L. R. 25 Bom. 129* (*Vinayak Vithal v. Gorind Venkatesh*).
- (8) (1907, *I. L. R. 31 Mad. 366 (F. B.)* (*Rangappa Naik v. Kamti Naik*).
- (9) (1910, *I. L. R. 32 All. 176* (*Baktawar v. Bhagojana*).
- (10) (1911, *I. L. R. 34 All. 129* (*Abdulla v. Ram Lal*).
- (11) (1909, *I. L. R. 34 Bom. 165* (*Pilu v. Babaji*).
- (12) (1911, 13 *Bom. L. R. 940* (*Ramkrishna v. Tripurabai*).
- (13) (1912) 14 *Bom. L. R. 602* (*Abhesang Tirabhai v. Raisang Fatesang*).

17 *Cal. W. N.* 1062 (1), *I. L. R.* 35 *Cal.* 939 (2), 12 *Mad. L. T.* 325 (3), 23 *Mad. L. J.* 363 (4), 46 *P. R.* 1912 (p. 171) (5), *I. L. R.* 21 *All.* 71 (P. C.) (6), and *I. L. R.* 19 *Cal.* 236 (P. C.) (7), referred to; also Rama Krishna's Hindu Law, Vol. II (1913 edition), pp. 346-357.

Second appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Rawalpindi, dated the 13th May 1912.

Gobind Das, for appellants.

Muhammad Iqbal and Kanwar Sain, for respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—The facts of this case are briefly these:—By 25th May 1914. a registered deed, dated the 25th October 1909, Mussammat Lajwanti, defendant No. 1, widow of Kishan Chand, and Shankar Das, defendant No. 2, first cousin of her deceased husband, sold a portion of the land left by Kishan Chand, which Mussammat Lajwanti was holding on the usual widow's life-estate, to Raja Khan, defendant No. 3. On the 29th April 1911 the present suit was brought by Ram Chand and Mussammat Nanki, daughter of Dittoo Mal, for a declaration that the sale of the land in question in favour of Raja Khan shall not affect their reversionary rights after the death of Mussammat Lajwanti. Ram Chand died during the pendency of the suit in the first Court, and his sons, Devi Das and Deputy Lal, were brought on the record as his legal representatives.

In answer to the plaintiffs' suit, the defendants pleaded that the plaintiffs were not the reversioners of Kishan Chand, deceased, husband of Mussammat Lajwanti; that the land in suit was not ancestral; and that Shankar Das, defendant No. 2, who was the presumptive heir at the time when the sale was made, having assented to the sale by joining as a co-vendor with the widow, the plaintiffs were precluded from contesting the validity of the sale.

The District Judge held that the plaintiffs were the collaterals of Mussammat Lajwanti's deceased husband; that, although the land was not ancestral property, *qua* the plaintiffs, they could contest the sale by the widow; that the sale was not validated merely by the consent of Shankar Das, defendant

(1) (1913) 17 *Cal. W. N.* 1062 (*Gopeshwar v. Durgamari*).

(2) (1908) *I. L. R.* 35 *Cal.* 939 (*Pulin Chandra v. Bolai Mandal*).

(3) (1912) 12 *Mad. L. T.* 325 (*Mattamooddy Raghupathy v. Kattamooddy*).

(4) (1912) 23 *Mad. L. J.* 363 (*Kannamma*).

(5) 46 *P. R.* 1912 (p. 171) (*Tek Chand v. Mussammat Gopal Devi*).

(6) (1898) *I. L. R.* 21 *All.* 71 (P. C.) (*Sham Sundar Lal v. Achhan Kunwar*).

(7) (1891) *I. L. R.* 19 *Cal.* 236 (P. C.) (*Behari Lal v. Madho Lal*).

No. 2, who was the nearest reversioner at the date of the sale; and that the sale had not been made for legal necessity.

In support of his view regarding the non-validation of the sale by the consent of the nearest reversioner the District Judge relied on the Full Bench decision of the Allahabad High Court in *I. L. R. 6 All. 116* (1). As a result of the above findings, the District Judge decreed the plaintiffs' claim.

On appeal the learned Divisional Judge agreed with the District Judge that the plaintiffs were the collaterals of Kishan Chand, and that the sale was not made for legal necessity; but following the decision of their Lordships of the Privy Council in the case of *Bajrangi Singh and another v. Manokarnika Bakhsh Singh* (*I. L. R. 30 All. p. 1*) (2) he held, differing from the District Judge, that the nearest reversioner of the widow's husband having consented to the sale in question the plaintiffs could not challenge it. He accordingly accepted the appeal and dismissed the plaintiffs' suit.

The plaintiffs have preferred a second appeal to this Court, and their learned pleader has urged that the Divisional Judge has not correctly understood the decision of the Judicial Committee in *I. L. R. 30 All. p. 1* (2), and that that decision is no authority for the proposition that in all cases and under all circumstances the consent of the next reversioner of a Hindu widow in possession of her husband's estate to an alienation of a portion of that estate validates the alienation and debars the more remote reversioners from contesting it. It is admitted that the parties are governed by Hindu Law.

The Privy Council decision on which the Divisional Judge has relied has been the subject of consideration by the High Courts in this country, and we have been referred to a large number of recent decisions bearing on the point before us. The appellants' pleader has cited *I. L. R. 31 Mad. 366* (F. B.) (3); *I. L. R. 32 All. 176* (1); *I. L. R. 34 All. 129* (5); *I. L. R. 34, Bom. 165* (6); *13 B. L. R. 949* (7); *14 B. L. R. 602* (8); *I. L. R. 40 Cal. 721* (F. B.) (9); and *17 C. W. N. 1062* (10).

(1) (1883) *I. L. R. 6 All. 116* (F. B.) (*Ramphal Rai v. Tula Kuari*).

(2) (1907) *I. L. R. 30 All. 1* (P. C.) (*Bajrangi Singh v. Manokarnika*).

(3) (1907) *I. L. R. 31 Mad. 366* (F. B.) (*Rangappa Naik v. Kamti Naik*).

(4) (1910) *I. L. R. 32 All. 176* (*Bakhtawar v. Bhagwan*).

(5) (1911) *I. L. R. 31 All. 129* (*Abdulla v. Ram Lal*).

(6) (1909) *I. L. R. 31 Bom. 165* (*Pilu v. Babaji*).

(7) (1911) *13 Bom. L. R. 940* (*Ramkrishna v. Tripurabai*).

(8) (1912) *14 Bom. L. R. 602* (*Abhesang Tirabhai v. Raisang Fatesang*).

(9) (1913) *I. L. R. 40 Cal. 721* (F. B.) (*Devi Prasad v. Golap Bhagat*).

(10) (1913) *17 Cal. W. N. 1062* (*Gopeshwar v. Durgamani*).

On the other hand, the Counsel for the respondents (for the widow and for the vendee, respectively) have relied upon *I. L. R. 35 Cal. 939* (1); *12 M. L. T. 325* (2); *23 M. L. J. 363* (3) and *46 P. R. 1912* (at page 171 (4)). The whole case-law upon the subject is carefully summarised in Rama Krishna's Hindu Law, Volume II (edition of 1913), pages 346-357.

In the Privy Council case, *I. L. R. 30 All. p. 1* (5), the widow had made sales for valuable consideration of successive portions of her husband's property to her own son-in-law, and the sales taken together covered the whole estate. These sales were made without legal necessity, and the consent of the reversionary heirs of the widow's husband was not obtained when the sales were made. Subsequently some of the reversioners, who were at the time admittedly the nearest reversionary heirs to her husband's estate, executed two deeds of relinquishment in favour of the widow for a certain consideration and ratified the sales that had been made by her to her son-in-law. After the widow's death the property sold, which consisted of revenue paying land, was duly mutated in the name of the son-in-law; but after the death of the son-in-law the sons of some of the reversioners who had consented to the sales by the widow brought a suit in their capacity of reversionary heirs of the widow's husband for possession of the estate.

One of the questions for decision before their Lordships of the Privy Council was whether the consent of the fathers of the plaintiffs, who were the nearest reversionary heirs at the time of the sales by the widow and who had subsequently ratified the sales for consideration, did not debar the plaintiffs from questioning the validity of those sales.

In the course of their judgment, after referring to two of their previous decisions bearing upon the question of the validation of an alienation made by a Hindu widow without legal necessity by the consent of her husband's kindred, their Lordships observe that upon the practical application of the general principle laid down in those decisions there has been much discussion in the High Courts in India. They then refer to the decision of the Allahabad High Court in *I. L. R. 6 All.*

(1) (1908) *I. L. R. 35 Cal. 939* (*Pulin Chandra v. Bolai Mandal*).

(2) (1912) *12 Mad. L. T. 325* (*Kattamoody Raykuppethy v. Kattamoody*

(3) (1912) *23 Mad. L. J. 363* (*Kannamma*).

(4) *46 P. R. 1912* (p. 171) (*Tek Chand v. Mussammat Gopal Devi*).

(5) (1907) *I. L. R. 30 All. 1* (P. C.) (*Bajrang Singh v. Manokanika*).

116 (F. B.) (1) to the effect that the consent of the heir presumptive to an alienation by a widow was not sufficient to defeat the rights of a more remote reversioner, and that an assignment by the widow to the heir presumptive has no greater effect in his favour than it would have had if he were a stranger. Reference is then made to two decisions of the Calcutta High Court, *I. L. R.* 10, *Cal.* 1102, *F. B.*, (2) and *I. L. R.* 17, *Cal.* 896, (3) and to the Full Bench decision of the Madras High Court in *I. L. R.* 21, *Mad.* 128, (4) as laying down the principle that if a Hindu widow was competent to surrender her whole estate to the next heir of her husband it followed as a legitimate consequence that she could also alienate it with his consent without any legal necessity.

Next their Lordships refer to the ruling of the Bombay High Court in *I. L. R.*, 25, *Bom.* 129 (5), and quote with approval the view of Ranade, J., that in order to validate an alienation by a widow otherwise than for legal necessity the consent of the reversioners must be of such kindred the absence of whose opposition raises the presumption that the alienation was a fair and proper one. Their Lordships then go on to observe:—

“The principle being thus admitted by the High Courts in India, the question of the *quantum* of consent necessary only remains. The High Court of Allahabad, indeed, does not recognize the validity of surrenders in favour, or alienations with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioner at the time of the widow’s death. But this restriction is at variance with the principle itself, and is not in accordance with practice in other parts of India in which the Mitakshara law prevails * * * They (their Lordships) agree with the High Court of Calcutta *Radha Shyam Sircar v Joy Ram Senapati* (3) that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible.”

In the next paragraph their Lordships apply the rule above enunciated to the case before them, and at the same time point out, as found by the Judicial Commissioner of Oudh, that of the seven reversionary heirs who had executed deeds of relinquishment in favour of the widow two were four degrees removed

(1) (1885) *I. L. R.* 6 *All.* 116 (F. B.) (*Ramphal Rai v. Tula Kauri*).
 (2) (1881) *I. L. R.* 10 *Cal.* 1102 (F. B.) (*Nobokishore v. Hari Nath*).
 (3) (1890) *I. L. R.* 17 *Cal.* 896 (*Radha Shyam v. Joy Ram*).
 (4) (1897) *I. L. R.* 21 *Mad.* 128 (*Marudamuthu v. Srinivasa Pillai*).
 (5) (1900) *I. L. R.* 25 *Bom.* 129 (*Vinayak Vithal v. Govind Venkatesh*).

and five were five degrees removed from the common ancestor of themselves and the widow's deceased husband. There did not appear to have been alive at the time of the sales by the widow any other reversionary heirs at all in the line of the common ancestor.

Then follows what appears to be an important passage in the judgment :—" Their Lordships agree with the Judicial Commissioner that the consent of these persons was sufficient, " and that it is immaterial that it was given after the execution " of the deeds. * * * The appellants who claim through " Matadin Singh and Baijuath Singh must be held bound by " the consent of their fathers."

From the judgment of their Lordships three important facts emerge with sufficient clearness :—

(1) that the widow had sold the whole estate of her husband to a stranger for valuable consideration.

(2) that the whole body of the nearest reversioners of her husband (indeed, according to the Judicial Commissioner, the whole body of reversioners), had ratified the sales and assented to them after receiving consideration for their ratification and assent.

(3) that the suit which was brought to contest the sales was brought by the sons of the consenting reversioners.

The appellants' learned pleader has argued with great force that the ruling of their Lordships in *Bajrangji's* case (1), must be interpreted by the light of the facts of that case and of the observations made by their Lordships in the course of their judgment, and that their Lordships did not intend to lay down the broad proposition that in all cases and under all circumstances the mere assent of the nearest reversionary heir to an alienation made by a Hindu widow without justifying legal necessity debars the more remote reversionary heirs from contesting that alienation.

After careful consideration of the decisions of the High Courts of Madras, Allahabad, Bombay and Calcutta, to which reference has been made above, we are of opinion that the view of the Divisional Judge in this case cannot be sustained. It is unnecessary for us to discuss in this place the above mentioned decisions of the High Courts in which the Privy Council case has been considered and explained, as it is sufficient to say for our present purpose that we entirely agree in the view of the law as propounded in the recent Full Bench decision of the Calcutta High Court in *I. L. R. 40 Cal. 721* (2).

(1) (1907) *I. L. R. 30 All. 1 (P. C.)* (*Bajrangji Singh v. Manokarnika*).

(2) (1913) *I. L. R. 40 Cal. 721 (F. B.)* (*Debi Prasad v. Golap Bhagat*).

In that case the question referred to the Full Bench was this—"Is the alienation by way of mortgage by a Hindu widow of a portion of the estate of her husband without any proved legal necessity, but with the consent of the nearest reversioner for the time being, valid and binding on the actual reversioner who is not the heir of the consenting reversioner"?

After a full discussion of the several Privy Council decisions, including the decision in *Bajrangi's* case, bearing on the question referred, the learned Chief Justice, Sir Lawrence Jenkins, sums up the result of the authorities as follows:—

"The result, then, of the authorities binding on us appears to me to be thus. To uphold an alienation by a widow of her deceased husband's estate where she is his heir it should be shown—(i) that there was legal necessity, or (ii) that the alienee, after reasonable enquiry as to the necessity, acted honestly in the belief that it existed, or (iii) that there was such consent of the next heirs as would raise a presumption, either of the existence of necessity, or of reasonable inquiry and honest belief as to its existence, or (iv) that there was a consent of the next heirs to an alienation capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and consequent acceleration of the interest of the consenting heirs. Where any one of the first three positions is established, the alienation may be of the whole or any part of the husband's estates, but where the fourth alone is proved, then the alienation must be of the whole.

"Here the alienation is only of a part of the husband's estate, and that by way of mortgage, so that the fourth position cannot apply.

"I would therefore answer the question propounded by saying that the alienation by way of mortgage by a Hindu widow as heiress of a portion of the estate of her deceased husband, without proof either of legal necessity or of reasonable enquiry and honest belief as to its existence, but with consent of the next reversioner for the time being, will be valid and binding on the actual reversioner if the presumption of legal necessity or of reasonable enquiry and honest belief raised by such consent is not rebutted by more cogent proof."

Another member of the Full Bench, Sir Ashutosh Mookerjee, after referring to the theory maintained by Lord

Davey in *I. L. R.* 21, *All.* 71 (1), that consent of reversioners merely affords proof of the propriety of the alienation by the widow, and also to the doctrine of surrender of the estate by the widow in favour of the next reversioner as explained by Lord Morris in *I. L. R.* 19, *Cal.* 236 (2) goes on to say :—

“ The two doctrines thus formulated and applied, came up for examination by their Lordships of the Judicial Committee in *Bajrangī Singh v. Manokarnika Bakhsh Singh* (3), and it is remarkable that neither theory was expressly repudiated or approved, though detailed reference was made to judicial decisions in which either the one or the other principle had found acceptance. Under these circumstances, I think, the inference may legitimately be drawn from the decision of their Lordships in *Bajrangī Singh v. Manokarnika Bakhsh Singh* (3) that both the doctrines are well founded on principle ; the only question is, what are the limitations or qualifications, if any, subject to which each of these doctrines has to be applied. If the widow has alienated the whole of the estate of her husband with the consent of some only of the immediate reversioners, or, if she has alienated a part only of the estate of her husband with the consent of all the immediate reversioners, or, again, if she has alienated part of the estate of her husband with the consent of some only of the immediate reversioners, the consent merely furnishes evidence of the propriety of the transaction or of the fact that the transferee has taken after due enquiry as to the existence of legal necessity.

“ The presumption which thus arises from the consent of the reversioners is not conclusive and is rebuttable ; but, plainly, there is no room for the application of the relinquishment theory. In each of these cases, either the widow does not absolutely convey and destroy her limited estate or she does not accelerate the estate of the entire body of immediate reversioners.

“ On the other hand, if the widow transfers the entire estate of her husband with the consent of the whole body of immediate reversioners, the relinquishment theory becomes forthwith applicable ; the position is precisely the same as if the widow had withdrawn completely and in its entirety her own qualified estate, and the whole estate had vested at once in the entire body of immediate reversioners who, upon this acceleration

(1) (1898) *I. L. R.* 21 *All.* 71 (P. C.) (*Sham Sудар Lal v. Achhan Kumar*).

(2) (1891) *I. L. R.* 19 *Cal.* 236 (P. C.) (*Behari Lal v. Madho Lal*).

(3) (1907) *I. L. R.* 30 *All.* 1 (P. C.) (*Bajrangī Singh v. Manokarnika*).

“ of their estate, had conveyed an absolute interest to the transferee.

“ The distinction between the two classes of cases is fundamental and well marked, and if it is borne in mind, we can appreciate without difficulty why Sir Andrew Scoble observes in *Bajrangji Singh v. Manokarnika Bakshi Singh*, that “ ordinarily the consent of the whole body of persons constituting the next reversioners should be obtained, as laid down in *Railha Shyam Sircar v. Joy Ram Senapati* (1), but that “ there may be cases in which special circumstances may “ render the strict enforcement of this rule impossible. “ This view is consistent only with the doctrine that consent of “ reversioners, in certain classes of cases as already explained, “ merely furnishes presumptive evidence of the propriety of the “ transaction; from this standpoint, the rule laid down in “ *Ramphal Rai v. Tula Kuari* (2), cannot be sustained.”

The same learned Judge then sums up the result in these terms :—

“ Upon an examination, then, of the texts and judicial “ decisions applicable to this matter, and upon a review of the “ principles which underlie them, the following propositions “ appear to be deducible :—

“ (i) When a Hindu widow has alienated, in whole or in “ part, the estate inherited by her from her husband, the “ transferee can establish a good title as against the reversionary “ heir after her death, if he proves that the alienation was made “ by her for purposes of legal necessity.

“ (ii) When a Hindu widow has alienated, in whole or in “ part the estate inherited by her from her husband, the trans- “ feree can establish a good title as against the reversionary heir “ after her death, if he proves that he made proper and *bona fide* “ enquiry as to the actual existence of legal necessity, and did “ all that was reasonable to satisfy himself as to the existence “ of such necessity.

“ (iii) When a Hindu widow has alienated, in whole or in “ part, the estate inherited by her from her husband, with the “ consent of the reversionary heirs, such consent may raise the “ presumption that the transfer was for legal necessity or that “ the transferee had made proper and *bona fide* enquiries and “ had satisfied himself as to the existence of such necessity. “ The *quantum* of consent necessary to raise this presumption

(1) (1890) I. L. R. 17 Cal. 896 (*Radha Shyam v. Joy Ram*).

(2) (8883) I. L. R. 6 All. 116 (F. B.) (*Ramphal Rai v. Tula Kuari*).

“depends upon the facts of each particular case, and in all cases
“the presumption raised by such occurrence on the part of the
“reversioners is rebuttable.

(iv) When a Hindu widow has alienated her entire interest
“in the estate inherited by her from her husband, with the
“consent of the whole body of persons entitled to succeed as
“immediate reversionary heirs, the transferee acquires a good
“title as against the actual reversionary heirs at the time of
“her death.”

In the result, Sir Ashutosh Mookerjee concurred with the learned Chief Justice in the answer proposed by him to the reference.

This decision of the Calcutta High Court is, in our opinion, perfectly sound, and we have no hesitation in following it.

The ruling of this Court, No. 46, P. R. 1912 (1), which has been relied on by the respondents' counsel, is not directly applicable to the facts of the case before us. There, the nearest reversioners of the widow's husband who had consented to the alienation by the widow had male issue, and it is pointed out by this Court that the chances of the then plaintiffs (he being a more remote reversioner succeeding to the property in suit by inheritance were very remote and insufficient to support a suit for a declaration of the invalidity of the alienation under section 42 of the Specific Relief Act. The reference to *Bajrangt's* case at page 171 was in the nature of *obiter dictum*, and it seems to us that the learned Judges did not feel called upon to consider and lay down in clear terms what the real effect of the decision of their Lordships of the Privy Council on that case was. It is significant, however, that the learned Judges explicitly stated in the paragraph relied upon that the consent of the nearest reversioners concerned must be a *bona fide* one.

In the case before us the learned Divisional Judge has dismissed the suit of the plaintiffs simply and solely on the ground that they are debarred from suing by reason of the consent of the nearest reversioner, Shankar Das, to the sale by the widow in favour of Raja Khan. This position is untenable, and the question of the effect of the consent of Shankar Das on the plaintiffs' claim must be decided with reference to the considerations laid down by the Calcutta High Court in the Full Bench decision above referred to.

We observe that the Divisional Judge has not recorded considered findings on the questions whether the plaintiffs are

the reversionary heirs of Kishan Chaud, deceased, and whether the sale by the widow was for legal necessity; and he must record fresh findings on these two points after careful consideration of the evidence adduced by the parties. He must also decide whether or not there are any other reversionary heirs of Kishan Chaud, deceased, between Shankar Das and the plaintiffs, and if there are any other reversioners, how the fact of their existence would affect the plaintiffs' claim.

For the foregoing reasons, we accept the appeal, set aside the decree of the Divisional Judge and remand the case to him for rededecision under rule 23 of Order XII, Civil Procedure Code. The stamp on this appeal will be refunded and other costs will be costs in the cause.

Appeal accepted.

No. 92.

*Before Hon. Sir Alfred Kensington, Kt., Chief Judge,
and Hon. Mr. Justice Shah Din.*

KARAM CHAND—(PLAINTIFF)—APPELLANT,

Versus

JAI RAM AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 456 of 1912.

Hindu Law—joint Hindu family—succession to property inherited from maternal grandfather—ancestral property.

One K. M. and his brother S. R. inherited a house from their maternal grandfather. S. R. died childless in January 1876 and K. M. had at that time a son living, viz., K. C., the present plaintiff, and the question was whether on S. R.'s death the house became the sole property of his surviving brother K. M. by survivorship or whether it was ancestral property in which K. C., the son of K. M., would also have a share.

Held, that as the house did not come to the brothers K. M. and S. R. by descent from a lineal male ancestor in the male line it was not ancestral in Hindu Law, but was K. M.'s sole property on the death of S. R. which he could dispose of by will.

I. L. R. 29 All. 667 (1) and 42 P. R. 1910 (P. C.) at page 128 (2), followed.

I. L. R. 27 Mad. 382 (3), differed from.

I. L. R. 25 Mad. 678 (P. C.) (1), referred to; also Mulla's Hindu Law paras. 31 (1) (b) and 182 (2), Mynne's Hindu Law, 7th Ed., pp. 344 and 768, and Trevelyan's Hindu Law, p. 232.

(1) (1907) *I. L. R. 29 All. 667 (Jamna Prasad v. Ram Partap)*.

(2) 42 *P. R. 1910 (P. C.)* (p. 128) (*Atar Singh v. Thakar Singh*).

(3) (1913) *I. L. R. 27 Mad. 382 (Vythinatha Ayyar v. Yegji Narayana Ayyar)*.

(4) (1902) *I. L. R. 25 Mad. 673 (P. C.) (Venkayyamma Garu v. Venkata-ramanayamma)*.

Second appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Rawalpindi, dated the 19th February 1912.

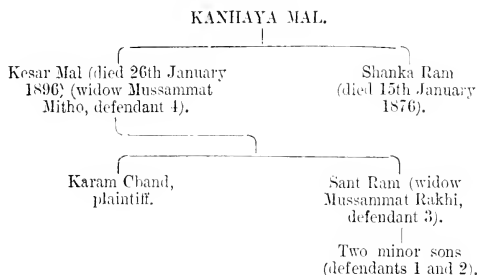
Morton, for appellant.

Pestonji Dadabhai and N. C. Mehra, for respondents.

The judgment of the Court was delivered by—

SIR ALFRED KENSINGTON, C. J.—The plaintiff-appellant in this case claims half of a house in Rawalpindi as against his brother's widow and her two minor sons. The lower Courts have agreed in dismissing the suit and on the general merits there is little to be said for the plaintiff who appears to have separated many years ago from the alleged joint Hindu family and to have settled elsewhere, leaving the brother and his widow in undisturbed enjoyment of the entire house in dispute. We have, however, to consider the appeal with reference to a technical and somewhat obscure point of Hindu law. 11th June 1914.

To make the case clear the pedigree must be reproduced, as it is incorrectly printed at page 3 of the paper-book.



The plaintiff's first contention is that the house is ancestral property inherited from Kanhaya Mal. The lower appellate Court has distinctly found that he has not proved this, and this is a finding of fact which cannot be reconsidered. Thereafter the argument has proceeded on the apparently correct assumption that the house was inherited by Kesar Mal and Shanka Ram jointly from their maternal grandfather. The question is, whether on Shanka Ram's death in 1876 it passed by survivorship to Kesar Mal alone, or became part of an ancestral joint family estate giving inherent rights to Karam Chand (born previously). In the former case Kesar Mal had the right to dispose of the entire house in 1893 by a registered will excluding Karam Chand from inheritance. In the latter case plaintiff's claim to half the house should be allowed.

Stated in other words the question is, whether Kesar Mal and Shanka Ram inherited the property as joint tenants with right of survivorship or as tenants in common.

In paragraph 31 (1) (b) of his principles of Hindu law Mulla states the case categorically in favour of a joint tenancy, but the matter is further discussed with reference to rulings of the Privy Council and the High Courts of Madras and Allahabad under paragraph 182 (2). Mayne's Hindu Law, 7th edition, pages 344 and 768, and Trevelyan's Hindu Law at page 232 also deal with the matter with special reference to the intention of the Privy Council ruling in *I. L. R. 25, Mad. 678* (1).

If the ruling quoted is to be interpreted literally, the house, though inherited from a maternal grandfather, is to be treated as ancestral property, and it has been so interpreted by a Division Bench of the Madras High Court in *I. L. R. 27. Mad. 382* (2). Authority is so far in plaintiff's favour, but a different construction has been placed on their Lordships' use of the term "ancestral" in a very carefully worded judgment of the Allahabad High Court, *I. L. R. 29, All. 667* (3).

After consulting the commentators on this arguable point we think that with all respect to the learned Judges of the Madras High Court we should follow the Allahabad decision. We are fortified in this conclusion by a passage in a later ruling of the Privy Council published as 42, *P. R. 1910* (4), which contains the following passage at page 128 :—

"It is through their father, as heir of the above-named Dhanna Singh, that the plaintiffs claimed, and unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, through whom the plaintiffs also in like manner claimed, they are not deemed ancestral in Hindu Law."

It appears to us that their Lordships intended here to make it clear that they recognised the term "ancestral" property in Hindu Law to be limited to property which has come from certain male lineal ancestors as enumerated in the text books, and we do not think that the expression used in the earlier ruling 25, *Mad. 678* (*P. C.*) (1), justify us in qualifying

(1) (1902) *I. L. R. 25 Mad. 678* (*P. C.*) (*Venkayamma Garu v. Venkataramanayamma*).

(2) (1903) *I. L. R. 27 Mad. 382* (*Vythinatha Ayyar v. Yeggie Narayana Ayyar*).

(3) (1907) *I. L. R. 29 All. 667* (*Jamna Prasad v. Ram Partap*).

(4) 42 *P. R. 1910* (*P. C.*) (p. 128) (*Atar Singh v. Thakar Singh*).

this, which we take to be the generally received opinion on the point.

It follows that we treat the house in dispute as having been held by Kesar Mal and Shanka Ram as joint tenants with right of survivorship. On Shanka Ram's death the property passed absolutely to Kesar Mal, and not to him jointly with his son or sons, and he could dispose of it by will as he in fact did. The plaintiff has, therefore, no present right to half the house, and his appeal fails and is dismissed with costs to the defendants.

Appeal dismissed.

No. 93.

Before Hon. Sir Alfred Kensington, Kt., Chief Judge.

MUSSAMMAT HAYAT KHATUN AND OTHERS—

(PLAINTIFFS)—APPELLANTS,

Versus

MUSSAMMAT SHARAM KHATUN AND OTHERS—

(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 282 of 1914.

Guardians and Wards Act, VIII of 1890, sections 8—16—Courts not to interfere with family affairs which are satisfactory.

One A. B. died, leaving a sister, two widows and one son by each, aged 6 and 3 years, respectively, and two minor daughters. He left also some 200 *bighas* of land recorded after his death as owned by the two sons. The widows were on good terms and, being of the peasant class, quite well able to look after the interests of their own children. The sister applied to be appointed guardian of both the persons and property of all four children of A. B. and on this the brother of the second husband of one of the wives also applied to be appointed guardian of that woman's child. The District Judge eventually appointed a Hindu *lambardar* to be the guardian of the children's property.

Held, that the District Judge should not have entertained either of the applications and should not have interfered at all with the previous family arrangements which were quite satisfactory.

Miscellaneous first appeal from the decree of Sheikh Rukn-ul-Din, District Judge, Muzaffargarh, dated the 12th day of January 1914.

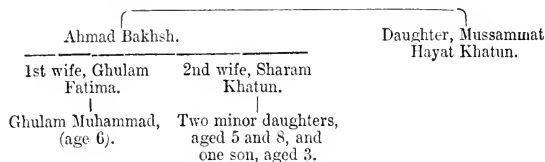
Kanwar Narain, for appellants

Respondents, in person.

The judgment of the learned Chief Judge was as follows—

SIR ALFRED KENSINGTON, C. J.—This case is good instance 18th June 1914.
of the unnecessary trouble caused by the District Courts in

many cases through uncalled for interference with family affairs under the Guardians and Wards Act. The following pedigree explains matters :—



Ahmad Bakhsh is said to have left some 200 *bighas* which has been recorded as owned half and half by the two sons by different wives.

These two women (both present) are apparently on good terms, notwithstanding the fact that the first wife, Ghulam Fatima, has remarried within the village.

There is apparently not the smallest reason why any one should interfere in the affairs of the family. Peasant women of this class, not observing any sort of *pardah* are quite well able to look after the interests of their own children. The probability is that they will do so better than any one else.

However on the 1st November 1913 *Mussammat Hayat Khatun*, sister of Ahmad Bakhsh, chose to apply for guardianship of the persons and property of all four of his children, as being her nephews and nieces. Seeing that the mothers of these children were alive the Court should have at once rejected the application.

The result of taking action was, that on the 12th December 1913 a further application was made by Hassan Bakhsh (brother of *Mussammat Ghulam Fatima's* second husband) asking that he should be appointed guardian of that woman's child Ghulam Muhammad as being his prospective father-in-law.

Then on the 12th January 1914, the District Judge passed the extraordinary order now under appeal. It professes to have been made by consent, but there is nothing on record to support this, and if the parties consented they can hardly have understood what they were doing. The arrangement made is that besides certain complicated orders about movables which go much beyond the legitimate scope of the Court's authority, the management of the property is made over to a Hindu *lambardar* on certain indefinite terms as to remuneration.

From this order *Mussammat Hayat Khatun* and Hassan Bakhsh have appealed, while the women Ghulam Fatima and

Sharam Khatun are equally vehement against it as respondents. There can clearly have never been any real agreement of parties and all unite in saying that the making over of the family property to a Hindu as a paid manager was the last thing they desired.

The whole arrangement is quite indefensible both as to the land, and as to certain arbitrary orders about the women's ornaments, some of which the Court ordered to be sold by auction and others to be held on security, and as to the sale of certain cattle left by Ahmad Bakhsh. There is no valid excuse for any sort of interference by the Court even although Mussammat Ghulam Fatima has done what is probably the best thing she could do by remarrying to the uncle of the girl to whom her son is betrothed.

Counsel for Mussammat Hayat Khatun recognises that the best thing for all concerned is that proceedings under the Act should be dropped altogether. His own client no longer presses her application for guardianship and in this she is well advised as the only possible result would be an endless series of family disputes. It is much to be regretted that she should have started the complication by an ill considered application, and still more that a District Judge of experience should have taken the matter up under the Act. As a general rule far less harm is done by leaving people to manage the affairs of their children in their own way than by attempting to do it for them through the agency of a District Court. There was here not even a *primâ facie* case for interference.

The appeal is accepted. The order of 12th January 1914 is set aside *in toto*. The applications for guardianship are dismissed in respect of both the persons and property of the minors. If any steps have been taken by the Court in pursuance of the order of 12th January they will be retraced as far as possible, and all concerned will be relegated so far as can be done to the position held by them before these proceedings were started.

Appeal accepted.

No. 94.

*Before Hon. Sir Alfred Kensington, Kt., Chief Judge, and
Hon. Mr. Justice Shah Din.*

BULAKI MAL—(DEFENDANT)—APPELLANT,

Versus

DUNI CHAND—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 264 of 1912.

Mortgage—conditional sale—on non-payment of interest for two years—applicability of Regulation XVII of 1806—redemption—limitation—post diem interest.

Plaintiff sued in March 1908 for redemption of a house mortgaged to defendant on 6th October 1870 for Rs. 300. Under the terms of the deed Rs. 200 were to carry interest @ Re. 1 per cent. *per mensem* and the interest on the remaining Rs. 100 was to be set off against the rent of the house, the mortgagee being in possession. It was also stipulated that if the interest was not paid for a period of two years the mortgage deed would thereafter be treated as a sale-deed and the house would become the absolute property of the defendant.

Held, that as no stipulated period for redemption was mentioned in the mortgage-deed Regulation XVII of 1806 did not apply to it, but held also, that the mere failure to pay interest for two years did not make the mortgagee the absolute owner of the mortgaged property and deprive the mortgagor of his right to redeem within 60 years.

1 P. R. 1881 (1), 50 P. R. 1906 (2) and 70 P. R. 1907 (3), referred to.

Held further, that defendant was entitled to the 2 years' interest mentioned in the deed and also to *post diem* interest at the stipulated rate for the 6 years prior to institution of the suit by way of damages.

95 P. R. 1902 4) referred to.

*Further appeal from the decree of P. D. Agnew, Esquire,
Additional Divisional Judge, Lahore, dated the 8th August 1910.*

Fazal-i-Hussain, for appellant.

Durga Das, for respondent.

The judgment of the Court was delivered by—

2nd Feby. 1914.

SHAH DIN, J.—This suit was brought by the plaintiff-respondent against the defendant-appellant for possession, by redemption, of a house situate in Lahore which had been mortgaged by way of conditional sale by the predecessor in title of the plaintiff to the defendant by a registered deed, dated the 6th October 1870, for Rs. 300.

(1) 1 P. R. 1881 (*Gurmukh Singh v. Malla*).

(2) 50 P. R. 1906 (*Bhag Singh v. Basawa Singh*).

(3) 70 P. R. 1907 (*Har Gopal v. Bhagwan Sahai*).

(4) 95 P. R. 1902 (*Jawahir Mal v. Raja Shah*).

Briefly, the terms of the deed were that of the mortgage-money, Rs. 200 would carry interest at the rate of Re. 1 per cent. per month and that interest on the balance, Rs. 100, would be set off against the rent of the house, the mortgagee being put in possession of it. Further, it was stipulated that if the interest on the sum of Rs. 200 was not paid as agreed upon for a period of two years, the mortgage-deed would, after the expiry of the said period of two years, be treated as a deed of sale and the house would become the absolute property of the defendant.

The present suit for redemption was brought on the 7th March 1908 ; and in answer to the plaintiff's claim the defendant-mortgagee pleaded, *inter alia*, that under the terms of the mortgage-deed of 1870, the mortgage had been foreclosed and the defendant had become the full owner of the house ; that the defendant had in the *bond fide* belief that the house was his absolute property, expended a large amount of money on improvements ; and that if the mortgage be held as still subsisting the plaintiff must pay to the defendant the full value of the improvements before he could obtain possession of the house by redemption.

The District Judge framed issues covering the pleadings of the parties, and held (1) that the mortgage sued upon had not been validly foreclosed under Regulation XVII of 1806, which, having been extended to the Punjab by the Punjab Laws Act, IV of 1872 (which had come into force on the 1st June 1872), governed the mortgage in question ; and (2) that the plaintiff was entitled to redeem the mortgage on payment of (a) principal mortgage money Rs. 300, (b) interest on Rs. 200 at the rate of 1 per cent. per mensem for eight years Rs. 192, *i.e.*, Rs. 48 for two years under the terms of the mortgage-deed, and Rs. 144 by way of *post diem* damages for six years next preceding the date of suit, and (c) compensation for improvements effected by the defendant Rs. 1,625-1-0 ; total Rs. 2,117-1-0. The District Judge passed a decree for redemption in favour of the defendant accordingly. From the decree of the District Judge cross-appeals were preferred to the Divisional Court by the plaintiff and the defendant, but the learned Divisional Judge agreed with the District Judge on all the points raised before him on both sides, and he dismissed both the appeals with costs.

A petition for revision under section 70 (1) (b) of the Punjab Courts Act (as it stood before its amendment by the Punjab Courts Act, I of 1912) was filed in this Court by the

defendant-mortgagee, urging (1) that the mortgage-deed, dated the 6th October 1870, was not governed by Regulation XVII of 1806, and that the defendant became full owner of the house in dispute on 6th October 1872; and (2) that the Divisional Judge was wrong in not allowing interest according to the terms of the deed on Rs. 200 up to the date of redemption. The petition for revision was admitted as an appeal by a Judge in Chambers with reference to the questions of law raised in the grounds for revision; and the plaintiff has filed cross-objections under Order XLI, Rule 22, Civil Procedure Code.

In support of the first ground of appeal the appellant's Counsel has relied on the terms of the foreclosure clause in the deed as set forth in the beginning of this judgment, and also on two decisions of this Court—50 *P. R.* 1906 (1) and 70 *P. R.* 1907 (2). The contention is that as “no stipulated period for redemption” is mentioned in the mortgage-deed the mortgage is not governed at all by Regulation XVII of 1806, and that the mortgage was *ipso facto* foreclosed, according to the terms of the deed, as soon as the interest, as agreed upon by the parties, was not paid for two years from the date of the mortgage.

According to the wording of section 8 of the Regulation and on the authority of the decisions of this Court cited above, the first branch of the contention advanced by the appellant's Counsel is doubtless sound, but, as pointed out in those very decisions, it does not follow that the mortgage was foreclosed owing to the default made by the mortgagor in paying the interest for two years as stipulated in the deed. There being no stipulated period for redemption the mere covenant between the parties relating to payment of interest and providing that in the event of default being made in the payment of interest for two years, the house would become the absolute property of the mortgagee does not suffice to deprive the mortgagor of his right of redemption within sixty years from the date of mortgage.

Besides, as pointed out in 1 *P. R.* 1881 (3), the mortgage-deed sued upon in this case was, at the time of its execution, subject to the provisions of clause 7 of section viii and section xii of the “Rules for the Administration of Civil Justice in the Punjab and Cis-Sutlej Province published by order of the Right Hon'ble the Governor-General of India, which rules

(1) 50 *P. R.* 1906 (*Blag Singh v. Basawa Singh*).

(2) 70 *P. R.* 1907 (*Har Gopal v. Bhagwan Sahai*).

(3) 1 *P. R.* 1881 (*Gurmukh Singh v. Mallo*).

were promulgated in the Punjab soon after its annexation under the authority of the Governor-General's Despatch No. 418, dated the 31st March 1849, para. 10. This order had the force of law in the Punjab under section 25 of the Indian Councils Act, 1861. Under the aforesaid rules the mortgage in question was not *ipso facto* foreclosed on the failure of the mortgagor to pay interest for two years from the date of the mortgage; and we must accordingly hold that the plaintiff's suit for redemption was maintainable.

There remains the question, whether the defendant-appellant is entitled to receive interest at the rate mentioned in the mortgage-deed on the Rs. 200 out of the mortgage-money up to the date of redemption. This question has been fully discussed by the Courts below; and after hearing the appellant's Counsel on this point, we hold that the principle laid down in the decision of this Court, 95 P. R. 1902 (1), applies to this case. The defendant is therefore not entitled to receive interest for a longer period than eight years, *i. e.* for two years under the terms of the deed and for six years by way of *post diem* damages. As a result of the above findings, we dismiss the defendant's appeal.

We come now to the plaintiff's cross-objections. His Pleader has contended (1) that the Lower Courts are wrong in law in allowing the defendant interest on Rs. 200 for more than two years, as also in awarding interest on the amount of the redemption money payable by the plaintiff to the defendant; (2) that the defendant is not entitled to the costs of the improvements alleged to have been made by him and that in any case the amount allowed is excessive; and (3) that the order of the lower Appellate Court as to costs is illegal and inequitable.

We think that these contentions have no force and we have no hesitation in overruling them. It seems to us to be clear on the authority of 95 P. R. 1902, (1) which reviews most of the authorities bearing on the point, that the defendant-mortgagee is entitled to receive, not merely two years' interest on Rs. 200 according to the terms of the deed, but also *post diem* interest on the said amount at the stipulated rate by way of damages for six years prior to the institution of the suit.

We are further of opinion that the District Judge was right in awarding interest on the redemption money at the rate of 1 per cent. per month from the date of the decree up to the

(4) 95 P. R. 1902 (*Jawahir Mal v. Raja Shah*).

date of payment into Court. The defendant was entitled to receive from the plaintiff the amount settled by the decree of the District Judge as redemption money, and so long as the plaintiff did not pay that amount to the defendant the latter was entitled to receive interest on the same. The plaintiff could and should have paid the redemption money into Court, and in that event he would not have been called upon to pay interest thereon to the defendant.

As regards the nature and extent of the improvements effected by the defendant while in possession of the house, and also as regards the cost of those improvements, the Courts below have discussed both these points at considerable length, and we need say no more in this place than that we entirely agree in their concurrent findings upon them. We cannot see how the order of the lower Appellate Court as to costs is illegal or inequitable, and there is no reason whatever for interfering with it. For these reasons, we maintain the decree of the lower Appellate Court and dismiss plaintiff's cross-objections.

As both the appeal and the cross-objections have been dismissed, we think the parties should pay their own costs in this Court, and we order accordingly.

Appeal dismissed.

No. 95.

*Before Hon. Mr. Justice Shah Din and Hon. Mr.
Justice Scott-Smith.*

MUNSHI RAM AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

RULIA RAM AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1059 of 1911.

Village common land—Grazing rights—claim by residents who are neither proprietors nor tenants—Wajib-ul-arz.

The plaintiffs, some of the residents of *Mauza Mazra* in the Hoshiarpur district, mostly shopkeepers by profession and neither proprietors nor tenants of land in the village, sued the proprietary body for a declaration that 1,190 *kanals* of *banjar* shall be kept as grazing land and that plaintiffs shall be entitled to graze their cattle in it, as of old, free of all charge. They relied upon an entry in the *Wajib-ul-arz* which lays down that the cattle of every proprietor and non-proprietor shall graze as of old in the *shamilat banjar* without charge.

Held, that as the heading of the clause in the *Wajib-ul-arz* shewed that plaintiffs were not parties to the agreement embodied therein, they had no claim under it, nor did previous user establish any right in their favour.

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Ludhiana, dated the 4th March 1911.

Duni Chand, for appellants.

Sheo Narain, for respondents.

The submitting order was delivered by—

CHEVIS, J.—The plaintiffs, 23 in number, reside in village 5th Feby. 1914.
Rur Mazra, but are neither proprietors nor tenants. They are of various castes, and seem mostly to be shopkeepers by profession. The defendants are the proprietary body.

Plaintiffs sue for a declaration that 1,190 *kansals* of *banjar* shall be kept as grazing land and that plaintiffs shall be entitled to graze their cattle in it as of old free of all charge. The defendants deny plaintiffs' right to graze free of charge, and say that any such grazing in the past has been permissive. The defendants plead that it is necessary to preserve the land in order to protect the village from the action of the hill streams.

The *Wajib-ul-arz* has a clause which lays down that the cattle of every owner and non-owner (*har ek malik wa ghair malik ke maweshi*) shall graze as of old in *shamilat banjar* without charge. The first Court has decreed the claim, in part, declaring that plaintiffs have the right to graze their cattle in such parts of the land in suit as may be allotted by the proprietors (which leaves it open to the proprietors to allot as little as they like), or, failing such allotment, in *khaskrah* No. 404.

The learned Divisional Judge in appeal has dismissed the suit, holding that the plaintiffs have failed to establish any rights and that the entry in the *Wajib-ul-arz* only refers to proprietors, tenants and others who are in any way connected with the settlement of the Land Revenue.

Now, had the entry referred to the *bashindagan* I think it might perhaps have been clearer that *all* residents of the village were referred to. Whether the phrase *ghair malik* means to include every resident other than a proprietor is the question. It may be that the phrase was intended to refer only to agriculturists and *kamins*. Or it may have been meant to refer to all residents other than the proprietors. One might say that the human race was made up of men and women, but to

say that there were none but men and women in the world would be to overlook the children.

I have been referred to 100 *P. R.* 1881 (1), 119 *P. R.* 1889 (2), and 86 *P. R.* 1911 (3), but while the first two cases seem to refer to tenants alone, the third refers to tenants and other residents.

The case involves an important point, and I note that the Divisional Judge states that it is "one of the cases, now becoming frequent, in which the proprietors of *shamilat* land in villages at the foot of the Sewaliks are seeking to reclaim that land and thereby protect their cultivated area from the action of the hill torrents." If the proprietors are to be restrained by every small body of residents who possess a few head of milch cattle it will be a serious thing for the proprietors. On the other hand, if the plaintiffs have a right to grazing it must not be taken from them simply to suit the proprietors.

I direct that the case be laid before a Division Bench.

The judgment of the Division Bench was delivered by—

1st June 1914.

SHAH DIN, J.—The facts of this case and the questions for decision are fully stated in the judgment of the Divisional Judge and in the referring order of the learned Judge in chambers. The plaintiffs-appellants sued for a declaration that 1,190 *kanals* of *banjar shamilat* shall be kept as grazing land and that they shall be entitled to graze their cattle in it, as in the past, free of charge. The defendants-respondents denied the alleged grazing rights of the plaintiffs; and the principal question for decision in the appeal is, whether under paragraph 4 (c) of the *Wajib-ul-arz* of the village the plaintiffs are entitled to the grazing rights claimed by them in the *shamilat* land.

The plaintiffs are neither proprietors in the village nor tenants; they are of various castes and are mostly shopkeepers by profession. The defendants are members of the proprietary body. After hearing the appellant's counsel, we have no hesitation in agreeing with the Divisional Judge that the plaintiffs have failed to establish their right to graze their cattle over the *shamilat* land in dispute without the permission of the proprietary body.

(1) 100 *P. R.* 1881 (*Nagina v. Baggu*).

(2) 119 *P. R.* 1889 (*Hira v. Nathu*).

(3) 86 *P. R.* 1911 (*Hansraj v. Narain Chand*).

The clause in the *Wajib ul arz* relied on by the plaintiffs is as follows :—

“ *Aur zamīn banjar shamilat men har ek malik wa ghair
“ malik ke maweshi badastur i qadim bila kharcha
“ mauzul charte rahen ge.*”

The plaintiffs claim that they as non-proprietors (*ghair maliks*) are entitled, by virtue of the right reserved to them under the above clause, to graze their cattle on the *banjar shamilat* in accordance with the ancient practice without payment of any dues to the proprietary body ; and the question for decision is, whether the plaintiffs are *ghair maliks* within the meaning of the above clause and can therefore exercise the right of grazing vested in the *ghair maliks* under the clause in question.

Now, this clause occurs in the third column of the *Wajib-ul-arz* of which the heading is as follows .—

“ *Bayan malikan wa bashindagan jinika kisi qism ka taalug
“ bandobast malguzari se hai.*”

As pointed out by the Divisional Judge, the plaintiffs are in no way connected with the settlement of the land revenue, being outside the pale of the village community, properly so called, and the heading of clause (c) of paragraph 4 of the *Wajib ul-arz* clearly shows that the plaintiffs were not parties to the agreement which was embodied in that clause. The plaintiffs have thus no rights of grazing whatever in the *shamilat* land, and if in the past they have been permitted by the proprietary body to graze their cattle in the *shamilat* free of charge, they cannot thereby be said to have acquired the right which they claim in the present suit.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 96.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Shadi Lal.*

MAHOMED RASHID AND ANOTHER—(DEFENDANTS)—
APPELLANTS,

Versus

RAHMAT-ULLAH—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 50 of 1912.

Civil Procedure Code, 1908, section 96 (3) and order XLIII, rule 1, clause (m)—appeal from order recording a compromise and decree passed thereon—compromise in excess of authority and against minor's interests.

On a deed of compromise made by the guardian *ad litem* of the minor defendant-respondent and the agent of the major defendant-respondent being

presented in the Appellate Court by the plaintiff-appellant, the Divisional Judge, being of opinion that the compromise was for the benefit of the minor, sanctioned it and passed a decree in accordance therewith—the defendants appealed to the Chief Court.

Held, that the order of the Divisional Judge was one directing the compromise to be recorded within the terms of order XXIII, rule 3, and an appeal against it was competent under clause (m) of order XLIII, rule 1, notwithstanding that the order directed at the same time that a decree be passed in accordance with the compromise, and that such a decree was accordingly passed.

Held also, that as the compromise was in excess of authority in regard to the major appellant and was entirely against the interests of the minor appellant, the order recording the compromise and the decree based thereon must be set aside.

Further appeal from the decree of P. L. Barker, Esquire, Divisional Judge, Amritsar Division, dated the 13th October 1911.

Zia-ud-Din, for appellants

Jalal-ud-Din, for respondent.

The judgment of the Court was delivered by—

2nd June 1914.

SHADI LAL, J.—One Khair Din, an Arain of village Bhaggapura in Ajnala *Tahsil* of the Amritsar District, gifted his entire self-acquired property to his grandson, Muhammad Rashid, minor, and his daughter-in-law, Mussammat Umar Bibi by two registered deeds, dated the 27th April 1903. The donor died on 14th May 1909 leaving him surviving a son, Rahmat Ullah, and the abovementioned donees who are son and wife, respectively, of the latter. It appears that Rahmat-Ullah is not on good terms with his wife, Mussammat Umar Bibi, and her son, Muhammad Rashid, and has married another wife by whom he has got a son.

This fact was admitted at the time of the hearing and probably accounts for this unfortunate litigation in the family.

The suit out of which this appeal has arisen was instituted by Rahmat-Ullah against the donees for the recovery of the property gifted to them, on the allegation that the parties were governed by Muhammadan Law under which the alienations were invalid as they were death-bed gifts. The Court of first instance held that the family followed the general agricultural custom under which the donor had authority to alienate his self-acquired property and that the gifts were, therefore, valid. It accordingly dismissed the suit.

The plaintiff appealed from the decree to the Divisional Court and on the 13th October 1911, which was the date of the final hearing of the appeal, presented in that Court a deed of compromise by which Miran Bakhsh as the *guardian ad litem*

of the minor and the agent of Mussammat Umar Bibi agreed that a decree should be passed in favour of the plaintiff for the entire property in dispute and that the parties should bear their own costs.

The Divisional Judge, being of opinion that the compromise was for the benefit of the minor, sanctioned it and passed a decree in accordance therewith.

The defendants who are dissatisfied with the compromise have preferred an appeal to this Court and the learned counsel for the respondent raises a preliminary objection that no appeal lies from a consent decree and relies upon section 96 (3) of the Civil Procedure Code of 1908 in support of his contention.

This objection is clearly untenable in face of clause (m) of order XLIII, rule 1, which gives the right of appeal from an order recording a compromise.

It is true that, according to the strict provisions of the law, the lower Appellate Court should have passed an order directing a compromise to be recorded as distinct from the final order giving a decree in terms thereof and that this requirement of law has not been fully complied with in the present case. But we have no doubt that the order of the Divisional Judge passed on the 13th October 1911 is one under order XXIII, rule 3, directing the compromise to be recorded and it does not cease to be such simply because it directs, at the same time, a decree to be passed in accordance with the compromise. We, consequently, hold that an appeal lies from it under order XLIII, rule 1, clause (m), and overrule the preliminary objection.

On the merits of the appeal, we entertain no doubt that the compromise is not binding either on Mussammat Umar Bibi or on her minor son.

As regards the former, it is absolutely clear that the power-of-attorney executed by her in favour of Miran Bakhsh does not authorize the latter to adjust the suit by compromise, and the agent's act in entering into the compromise in dispute was in excess of his authority and does not bind the principal. In fact the learned counsel for the respondent has not seriously resisted the appeal of Mussammat Umar Bibi and we have no hesitation in deciding that it must be accepted.

With regard to the minor we fail to understand how it can possibly be urged that a compromise which surrenders his entire property to the plaintiff was for his benefit, more especially when we find that the gift in his favour had been upheld by the Court of first instance. The so-called undertaking

by the father that he will not disinherit his son and that he will not alienate the property without necessity does not, in our opinion, constitute any justification for this compromise. It is to be observed that this undertaking is contained in a statement made by him before the Divisional Judge and does not form a part of the deed of compromise and it is, therefore, doubtful whether it can be enforced by the minor.

Even if we assume, for the sake of argument, that it is enforceable against the father it is, we think, beyond dispute that an alienee from him is not bound by his undertaking and that the minor can have no possible remedy against him (the alienee). Moreover, if the parties are, as alleged on behalf of the appellants, governed by custom, then restrictions on the father's power follow as a matter of course and the undertaking concedes to the minor nothing more than what he is already entitled to under the customary law.

It is, however, unnecessary to labour this point because we are clear that no guardian having the slightest regard for the interests of his ward could have acted in the manner in which Miran Bakhsh did. We cannot possibly hold the minor bound by a compromise which so completely surrenders his rights.

For these reasons we must accept the appeal, set aside the order recording the compromise and the decree based thereupon and remand the case to the Divisional Judge for decision on the merits

Costs in this Court will abide the event.

Appeal accepted.

No. 97.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Chevis.

MOWAZ AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

MUSSAMMAT GULAB JAN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 76 of 1910.

Custom—succession—will—ancestral and self-acquired property—daughters—collaterals in 3rd degree—Muhammadan Khattars, Attock District.

Held, that by custom among Khattars of the Attock District daughters succeed to their father's self-acquired property in preference to collaterals in

the third degree but that in regard to ancestral property the will in favour of the daughters was not proved to be valid by custom, the initial presumption having been admitted to be in favour of the collaterals.

Quære whether the initial presumption in regard to succession to ancestral property, among Muhammadan tribes, is in favour of near collaterals or in favour of daughters.

31 P. R. 1867 (1), 115 P. R. 1892 (2), 31 P. R. 1893 (3), 50 P. R. 1885 (4), 47 P. R. 1896 (5), 37 P. R. 1898 (6), 61 P. R. 1906 (7), 105 P. R. 1906 (8), 119 P. R. 1907 (9), 48 P. R. 1909 (10), 56 P. R. 1909 (11), and 19 P. R. 1912 (12), referred to.

15 P. R. 1907 (13) and 13 P. R. 1914 (14), distinguished.

First appeal from the decree of Sardar Charat Singh, District Judge of Attock, dated the 8th day of November 1909.

Muhammad Shafi, for appellants.

Pestonji Dadabhai, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—The common ancestor of the parties to this case was one Nadar Ali. He had 3 sons : (1) Gulab Khan, plaintiff No. 1 ; (2) Sher Ali, whose son Matwali is plaintiff No. 2 ; and Ahmad Ali, who had a son, Fateh Ahmad. It is the property of Fateh Ahmad which is now in dispute. This Fateh Ahmad, who died on the 28th of January 1907, left two widows and four daughters. Thirteen days before his death he executed a will in favour of his widows and daughters, translation of which will be found at page 40, Part I, of the printed Paper book.

The important passage in this will runs as follows :—

“ After my death, my wives, named Mussammat Gulab Jan and Mussammat Begam Jan, and all the four daughters, namely, Mussammats Zohra Jan, Nek Bakht, Suna Jan and Sardar Khanam, who according to Muhammadan Law, English Law and custom and according to the custom in vogue in the tribe to which our family belongs, are rightful owners—I do hereby declare that they should be recorded absolute

- (1) 31 P. R. 1867 (*Wuzeera v. Hakoo*).
- (2) 115 P. R. 1892 (*Mussammat Sharfan v. Kammu*).
- (3) 31 P. R. 1893 (*Mussammat Mirjan v. Rahmat*).
- (4) 50 P. R. 1885 (*Mussammat Schban v. Ghazi*).
- (5) 47 P. R. 1896 (*Baklu v. Amir*).
- (6) 37 P. R. 1898 (*Mussammat Emna v. Sajawal Khan*).
- (7) 62 P. R. 1906 (*Bholi v. Fakir*).
- (8) 105 P. R. 1906 (*Malik Nur v. Aishan*).
- (9) 119 P. R. 1907 (*Bakht Sawai v. Sardar Khan*).
- (10) 48 P. R. 1909 (*Allah Ditta v. Beg*).
- (11) 56 P. R. 1909 (*Deri Ditta Singh v. Dropti*).
- (12) 19 P. R. 1912 (*Muhammad v. Mussammat Bakhto*).
- (13) 15 P. R. 1907 (*Amir Ali v. Baggo*).
- (14) 13 P. R. 1914 (*Shahanchi Khan v. Mussammat Begam Jan*).

“owners with full powers in respect of the aforesaid entire property, movable and immovable, both house and landed, after I am dead and gone. The said daughters have been betrothed, but are yet unmarried and minors and live in my house. After marriage the said daughters shall be considered full owners and shall enjoy full rights like myself. If after the mutation of names any of the daughters dies sonless, her share shall go to the surviving daughters and their descendants in equal shares. After death, or re-marriages of my widows, their shares too shall go to the four daughters in equal shares. My collaterals shall have no claim whatever against my wives and daughters in respect of my aforesaid property, movable and immovable, both houses and landed.”

The daughters and the widows appear to have fallen out and to have litigated, with the result that a compromise was ultimately arrived at by which the four daughters got $\frac{2}{3}$ ds, and the widows $\frac{1}{3}$ d of the property. The plaintiffs were not parties to that suit, although they applied to be made parties.

Plaintiffs who are, as will be seen from the details given above, related to the deceased in the third degree, filed a suit in which they asked that a declaratory decree might be passed to the effect that the will shall not affect their rights after the death or *nikah* of the defendants, or that any other relief which the Court deemed proper might be granted to them.

The property in suit is extensive and diverse. Some of it, the defendants say, was self-acquired by Fatch Ahmad and his father; and as to this property, they plead that the plaintiffs have no *locus standi* to object to the will and that the plaintiffs are not heirs to the property by custom. They also go on to plead that even as regards the ancestral property, the daughters and the widows are, as compared with the plaintiffs, preferential heirs. It is also urged that the will is valid. Issues were drawn up by the learned District Judge and a large mass of evidence was placed on the record. The District Judge has detailed that evidence piece by piece, but, in our opinion, he has not really discussed in a satisfactory manner the important questions at issue in the case.

The first issue was “of the property left by Fatch Ahmad what is ancestral and what is acquired property?”

On this point all that the District Judge has to say is this: "I hold that it is not clear which estate is ancestral and which acquired, but the question is not material in this case. I hold that Fateh Ahmad's estate was ancestral."

In our opinion, this decision is not only self-contradictory; but we are unable to see how the District Judge could have arrived at the opinion that it was immaterial which property was ancestral and which acquired.

Among Muhammadans like these *Khattars* of the Attock District there can be no doubt whatever that the daughters will succeed to the self-acquired property of their father in preference to collaterals, even so near as the plaintiffs are. But as regards ancestral property, the matter is different; and, as will be seen later, our opinion is that in regard to such property the plaintiffs have superior rights and that, notwithstanding the will by Fateh Ahmad, the plaintiffs, who object to its alienation, must be declared to have ultimately superior rights to those of the defendants.

The second issue was—"What is the rule of succession, custom or Muhammadan Law, among the parties, who are *Khattars*, on the death of a proprietor without male issue?"

As to this, the learned District Judge after making some cursory remarks and observations found "I hold that daughters among *Khattars* succeed according to custom to their parent's estate."

The third issue is concerned with the distinction between ancestral and self-acquired property.

As to this, the lower Court says "there is no difference as to the estate being ancestral or acquired."

The Court then went on to find that Fateh Ahmad was "competent to will away his estate in favour of defendants." On two minor issues the District Judge says "I hold that it was unnecessary, and so is the case with 7th issue." It is not at all clear what this means.

We are unable to see what the District Judge meant by saying it was unnecessary, but probably he meant that the two issues were uncalled for.

The learned District Judge having thus dismissed the plaintiffs' claim, an appeal has been filed in this Court through *Khan Bahadur* Mian Muhammad Shafi, and we have heard

arguments which have extended over three days. We may say at once that, after exhaustive examination of all the oral and documentary evidence and of many rulings which have been quoted to us, our opinion is that a certain part of the property, which is admittedly self-acquired, belongs to the daughters who, at present, with the widows are in possession of it.

But as regards the ancestral property, the question of initial presumption is not free from difficulty. Mr. Shafi, quoting a mass of authority, most of which we have noted

in the margin, the omissions being of Rattigan's Digest section 23, 31 *P. R.* 1867 (1), 115 *P. R.* 1892 (2), 31 *P. R.* 1893 (3), 105 *P. R.* 1906 (4), 50 *P. R.* 1885 (5), 47 *P. R.* 1896 (6), 37 *P. R.* 1898 (7), 119 *P. R.* 1907 (8), 48 *P. R.* 1909 (9), 56 *P. R.* 1909 (10), 19 *P. R.* 1912 (11).

cludes a daughter from inheritance, and that gift or will in favour of a daughter is invalid in presence of such a collateral. On the other hand, we have such rulings as 62, *P. R.* 1906 (12) (*Gujars of Gujar Khan*), in which it was ruled that the presumption in the case of an endogamous tribe, which was well known as favouring the rights of daughters and daughters' sons, might be the other way. However, we need not pursue this subject further, for Mr. Pestonji admits that the initial presumption is against him and we have therefore only to see whether he has rebutted it.

The will makes the daughters absolute final owners of the whole estate regardless of whether they marry and of whom they marry; and we have to see what the ascertained custom of these *Khattars* as regards daughters is. We have first three records of custom—Robertson's for Rawalpindi and Kitelin's for Rawalpindi and Attock, respectively. In the first named compilation (1887) we find, at page 10, Question 12—

(1) 31 *P. R.* 1867 (*Wuzeera v. Ilakoo*).

(2) 115 *P. R.* 1892 (*Mussammat Sharfan v. Kamru*).

(3) 31 *P. R.* 1893 (*Mussammat Mirjan v. Rahmat*).

(4) 105 *P. R.* 1906 (*Malik Nur v. Aishan*).

(5) 50 *P. R.* 1885 (*Mussammat Sahban v. Ghazi*).

(6) 47 *P. R.* 1896 (*Baklu v. Amir*).

(7) 37 *P. R.* 1898 (*Mussammat Emma v. Sajawal Khan*).

(8) 119 *P. R.* 1907 (*Bakht Sauc v. Sardar Khan*).

(9) 48 *P. R.* 1909 (*Allah Ditta v. Beg*).

(10) 56 *P. R.* 1909 (*Devi Ditta Singh v. Dropti*).

(11) 19 *P. R.* 1912 (*Muhammad v. Mussammat Bakhto*).

(12) 62 *P. R.* 1906 (*Bhoti v. Fakir*).

"The near male kindred inherit in preference to the daughter; and under Question 13 it is stated that the *Khattars* give preference to a 5th degree collateral over a married daughter. Examples are given at page 36. Then under Question 18, page 12, we find it stated that among *Khattars* a daughter and a widow may take equally but on marriage of daughter the widow takes the whole. The answer to Question 19 says that unmarried daughters or daughters vowed to celibacy take equally with their brothers. Under Question 37 the *Khattars* say a man may leave one-third of his estate by will *outside his own family* but not inside.

In Kitchin's book on Rawalpindi the results are not very dissimilar. Question 13, pages 21 *et seq.*, show that no precise rules prevail, but two *Khattar* instances are given in which 5th degree collaterals failed to oust daughters. Under Question 37 the *Khattars* say a proprietor can only will away "a portion" of his ancestral estate and no instances are given among *Khattars*.

Mr. Kitchin's book on Attock is of more assistance. Under Question 12, which is in favour of near collaterals, seven actual instances are recorded. The examples under Question 13 point to 5th degree being the limit to the superiority of the collateral over the daughter. The answer to Question 19 is opposed to that given by Mr. Robertson—see above—and the answer to Question 37 and Question 38 as to power of bequest shows that precise definition is impossible, though the feeling is against this method of tampering with succession.

On the whole these three volumes are in favour of the appellants. At the same time, though opinions of experienced officers may be useful as a general guide, yet actual concrete instances are the materials which we must primarily use. Mr. Pestonji relies on 16 *Khattar* instances and 3 *Awan* instances, all to be found on the record; after examination of which we are inclined to agree with Mr. Shafi that practically none of them really help defendants at all. A large number of them ended in compromises, and in many others the reversioners, no doubt for special reasons, consented to gift or will or succession, as the case might be. A few of them were decided on questions quite apart from the problem now before us; and as the following brief

abstract will show, no rule favourable to defendants can be deduced from them :—

I.—Case of Ghulam Khan's daughters and their husbands.

Paper book, Part I, page 42, page 44, line 31 ; Part II, page 3 and page 94 (P. W. 20) not a contest between collaterals and daughters at all, and one daughter was excluded by the others from inheritance.

II.—Shahahmad of Madrotar.—Part II, page 13, Ex. D. 20 see page 19, last column : the alienation was of $\frac{1}{2}$ th only of estate and it is fairly clear that the collaterals consented.

III.—Muhammadi Khan of Kutbal.—Ex. D. 9, Part II, page 40 : no doubt there was a will in favour of daughters and it prevailed against the widow, but no collateral contested.

IV.—Ahmad Ali of Kutbal.—Compromised in such a way that nothing favourable to daughters as heirs can be deduced.

V.—Nausher Khan's case.—D. W. 7, page 98, Part II, and Ex. D. 5, page 23 : this was a case of *sale* for valid necessity of property found not ancestral *qua* the objector.

VI.—Nur Khan of Salargah.—D. W. 8, page 99, Part II, Ex. D. 11 ; Part II, page 34 : a case of mutation on a gift by a widow out of her own life estate of $\frac{2}{3}$ rds to her two daughters : the widow being alive, why should any collateral at that stage object ?

VII.—Ghazi Khan of Bungo.—This case is given by Mr. Kitchin in his Attock, Volume Ex. D. 23, page 79, Part II ; contest apparently between a wife and her husband for estate of wife's father, clearly not in point.

VIII.—Awaz Mulk of Sagri.—Part I, page 80, Ex. D. 13 : collaterals did exist, but degree unknown, contest was between descendants of two daughters.

IX.—Khudawlad of Kot Soulki.—Part II, page 46, Ex. D. 7, especially page 47, lines 32 *et seq* : contest was between nephew on one side and daughter and widow on the other ; on appeal, however, the Chief Court held that decision between collateral and daughter was premature and uncalled for.

X.—Muazzam Khan.—Part I, Ex. D. 2, page 51, and Ex. D. 3, page 72, case was compromised : contest was between two brothers ; one married to late owner's daughter ; compromise did not point to any special recognition of a daughter's claim.

XI.—Ahmadu Khan of Sarai Kharbuza.—Part II, page 4, Ex. D. 8 : there were two first cousins of last owner, and that

one who was married to latter's daughter succeeded : no real discussion of custom : there was a will in favour of the daughter also : so far as it goes this may be said to favour the defendants here.

XII.—*Ahmad Khan of Sarai Kharbuza*.—Part II, Ex. D. 4, page 26, another compromise and no deduction of principle possible.

XIII.—*Ahmadu Khan of Manza Jhang*.—Part I, Ex. D. 22, page 47 : 13 P. R. 1914 (1), is the case : this case does not appear to us to be in point : the only question for decision was whether, when a person takes property by gift, the gift enures for the benefit of male descendants only or also of female descendants.

XIV.—*Rusmat Ali Khan of Turbeti*.—Part II, page 10, Ex. D. 27 : this alienation was validated by the consent of plaintiff's father, who at the time was sole first reversioner.

XV.—*Haidar of Murat*.—Ex. D. 26 : mutation to widow and daughter by consent of the "persons concerned" : not known whether daughters were married and in any case widow was there.

XVI.—*Shadman Khan of Kutbal*.—D. W. 5 : no documents : few necessary particulars.

It is hardly necessary to go into the 3 Awan cases on which Mr. Pestonji also relied. In one the *onus* was wrongly laid and the case was disposed of on the absence of evidence of rebuttal of presumption. In another, 9 out of 11 reversioners for special reasons acquiesced in gift to nephews who were also sons-in-law, and the third case is 15 P. R. 1907 (2).

The *onus* being on defendants-respondents, it cannot be said that they have proved either that they have a better right of succession than plaintiffs or that the will helps them. Mr. Shafi meets their case by criticisms of their instances, for the most part as indicated above, and also by showing on the record some 23 cases of exclusion of daughters by near collaterals. No doubt Mr. Pestonji is able to animadvert on some of these instances as being supported only by oral evidence ; but after all there is little or no rebuttal, and for the most part the witnesses who testified to the instances were persons eminently likely to know the facts and they were not cross-examined.

(1) 13 P. R. 1914 (*Shahanchi Khan v. Mussammat Begam Jan*).

(2) 15 P. R. 1907 (*Amir Ali v. Baggo*).

There is also oral evidence, which it is sought to import into the case under section 32, Indian Evidence Act, on behalf of plaintiffs, see Part II, pages 24 and 31. The question of the admissibility of this evidence is not an easy one, but we are inclined to hold that it is not admissible, for controversy regarding this custom had arisen when those statements were being made. We do not think it is necessary to discuss various minor incidental points raised during the lengthy hearing of this appeal.

We hold that defendants have not proved that such a will as this is valid as it stands, or that the daughters, defendants, should be preferred as heirs to the plaintiffs, collaterals of Fateh Ahmad in the third degree. Plaintiffs are entitled to a decree that the will shall not affect their reversionary rights. We also do not think defendants have proved that a daughter, even if she marries one of the nearest collaterals, has any right as heir in presence of those collaterals.

We accept the appeal and give plaintiffs a declaration as prayed in plaint, with costs in both Courts.

Appeal accepted.

No. 98.

Before Hon. Sir Alfred Kensington, Kt., Chief Judge.

LAL SINGH AND ANOTHER—(OBJECTORS)—
APPELLANTS,

Versus

SHAM LAL AND ANOTHER—RESPONDENTS.

Civil Appeal No. 775 of 1913.

Guardian and Wards Act, VIII of 1890—application to Court for marriage of minor female ward—proper action of Court.

Held, that District Courts should not assume direct responsibility under the Guardian and Wards Act for the marriage of minors for whom a personal guardian has been appointed under the Act.

I. L. R. 22 Bom. 509 (1), referred to.

Miscellaneous first appeal from the decree of Sayul Wali Shah, District Judge, Gurgaon, dated the 18th day of March 1913.

Appellants, in 1 person.

Duni Chand, for respondents.

The order of the learned Chief Judge was as follows :—

SIR ALFRED KENSINGTON, C. J.—The facts of this curious dispute are as follow. Rattan Lal Bania died in 1911 leaving a daughter named Chambeli, aged about 16. Sham Lal, brother:-

18th June 1914.

in-law of Rattan Lal applied to be made guardian of her person and was so appointed on 10th October 1912, this Court declining to interfere on 3rd December 1912.

In the meanwhile one Lal Singh, now appellant, came on the scene alleging that Rattan Lal had betrothed Chambeli to his son some three years before, while Sham Lal wished her to marry a man named Ghisa who appears to be aged 23 (not 36 as stated in the present appeal). The Court did not go into the question of the previous betrothal, but after getting Ghisa medically examined had up all the parties, Chambeli included, on the 18th March 1913 and allowed her to make her choice. She selected Ghisa, and the Court thereon sanctioned marriage to him, while to satisfy Lal Singh Rs. 125 was deposited in Court by Sham Lal as being the sum which Lal Singh said he had expended on betrothal ceremonies. The order as to this sum was that Lal Singh could draw it for himself at any time up to a year.

Lal Singh, not unnaturally, appealed against this very summary order of 18th March 1913, and on the 15th May this Court prohibited marriage to Ghisa till further orders. It now transpires that Chambeli had been in fact married to Ghisa on 27th April 1913. She has been since living with Ghisa, and it is said, with the usual result, though this cannot be verified.

The District Judge evidently acted in good faith for what he considered to be the best interests of the girl, but it is no part of a Court's duty under the Guardians and Wards Act to assume direct responsibility of the kind, and it would have been better if the District Judge had simply declined to either sanction or prohibit the marriage to Ghisa, leaving the parties concerned to settle their dispute among themselves. Reference may be made to section 24 of the Act and to the ruling in *I. L. R. 22 Bom. 509 (1)*.

However now that the marriage has taken place I decline to still further complicate matters by interference, and the appeal is accordingly rejected. If the sum of Rs. 125 is still in deposit in Court I think that the District Judge should make it over to Lal Singh, notwithstanding the fact that the prescribed limit of a year has been exceeded. Lal Singh obviously could not prejudice his claim in appeal by applying for the money till that appeal was decided.

With that explanation I leave the lower Court to dispose of the Rs. 125 at its discretion. The appeal is dismissed. No order as to costs.

Appeal rejected.

No. 99.

*Before Hon. Mr. Justice Chervis and Hon. Mr.
Justice Shadi Lal.*

MEHRA—(PLAINTIFF)—APPELLANT,

Versus

MANGAL SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No 263 of 1912.

Custom—ancestral property—adoption—property inherited by adopted son—whether ancestral qua the latter's sons.

Held, that by custom property which comes to an appointed heir as such is not ancestral *qua* the latter's son, who whether born before or after the appointment of his father has consequently no status to challenge an alienation of such property by his father.

25 P. R. 1901 (1), 66 P. R. 1908 (2), 111, P. R. 1893 (3), 12 P. R. 1892 (F. B.) (4), 50 P. R. 1853 (F. B.) at page 231 (5) and 25 W. R. 225 (6), referred to.

9 P. R. 1893 (7) and 51 P. R. 1906 (8), distinguished.

*Second appeal from the decree of Rai Bahadur Lala Chuni Lal,
Divisional Judge of Sialkot, dated the 7th August 1911.*

Rambhaj Datta, for appellant.

Nanak Chand, for respondents.

The judgment of the Court was delivered by—

11th July 1914.

SHADI LAL, J.—This appeal arises out of a suit brought by Mehra, who is appellant in this Court, for possession of a plot of land sold by his father, Jawala, to the defendants in 1898. Jawala had been appointed an heir by one Amir and obtained the land in dispute in his capacity as the latter's heir.

It is admitted that the plaintiff was born subsequent to the appointment of Jawala as heir of Amir. On these facts, the Courts below have held that the land in the hands of Jawala was not ancestral *qua* the plaintiff, and that the latter has no *locus standi* to impeach the alienation. The plaintiff having been non-suited in the lower Courts has preferred a further appeal to this Court and the sole question for our determination is whether the above finding as to the nature of the property is or is not correct.

(1) 25 P. R. 1901 (*Fatteh Singh v. Nihal Singh*).

(2) 66 P. R. 1908 (*Tulsi v. Ram Rakha*).

(3) 111 P. R. 1893 (*Wazira v. Kahna*).

(4) 12 P. R. 1892 (F. B.) (*Sita Ram v. Raja Ram*).

(5) 50 P. R. 1893 (F. B.) (p. 231) (*Kalla v. Buiha*).

(6) (1876) 25 W. R. 225 (258) (*Baboo Juswant Singh v. Doolee Chand*).

(7) 9 P. R. 1893 (*Thannan Singh v. Jit Singh*).

(8) 51 P. R. 1906 (*Chajju v. Dalipa*).

The point is, so far as we are aware a novel one and not covered by any direct authority of this Court. The only two judgments of this Court which have been referred to by the lower Courts are 25 *P. R.* 1901 (1) and 66 *P. R.* 1908 (2), and both of them are inapplicable to the present case.

In the first case, an alienation was effected by an appointed heir and the person contesting it was an agnate of the appointer. As the property had descended from the common ancestor of the appointer and of the plaintiff in that case, the latter was rightly found entitled to attack the alienation which injured his reversionary rights. That case is clearly no authority for the proposition that a son of the appointed heir is similarly entitled to contest an alienation by his father.

The law is clear that in the event of the appointed heir dying childless and leaving no widow the estate which he inherited from the appointer passes to the male collaterals of the appointer's family if it consists of property over which the appointer had only a restricted power. The judgment in 66 *P. R.* 1908 (2), lays down the rule that the son of the appointed heir born prior to the appointment has no right to contest an alienation by his father of property received from the appointer.

In the case before us, the plaintiff was, as mentioned above, born after the appointment and the ruling has therefore no direct application. But for the reasons set out below we are of opinion that that fact should not make any difference and that the son of an appointee, whether born before or after the appointment of his father, is incompetent to contest an alienation by the latter of the property received from the appointer.

The point being *res integra*, we have to decide it in accordance with the general principles of customary law. It must be remembered that we are not here dealing with a ceremonial adoption of Hindu Law in which the adopted son is completely transferred from his natural family and becomes a part and parcel of the adoptive family in the same way as if he were a natural born son. But in the case of the customary appointment of heir it has been repeatedly held that it does not involve the transplanting of a person from one family to another. The tie of kinship with the natural family is not dissolved and the fiction of blood relationship with the members

(1) 25 *P. R.* 1901 (*Fateh Singh v. Nihal Singh*).

(2) 66 *P. R.* 1908 (*Tulsi v. Ram Rakha*).

of the new family has no application to the appointed heir. The relationship established between the appointer and the appointee is a purely personal one and does not extend beyond the contracting parties on either side (*vide, inter alia*, 111 P. R. 1893) (1).

It follows that the appointer or his male lineal ascendant cannot be called an ancestor of the appointee's son.

As regards the appointee's right to property, it is clear that he does not, ordinarily, lose his right of succession in his natural family and any property which he inherits from his natural father or any other male lineal ascendant would, undoubtedly, be ancestral *qua* his sons, and the latter are entitled to set aside an improper alienation of that property made by their father. But the same thing cannot be predicated with respect to the estate which the appointed heir receives from the appointer. If the estate consists of the self-acquired property of the latter, then the appointee becomes an absolute owner of it and has plenary power of disposal over it. If, on the other hand, the estate consists of property over which the appointer had only a restricted power, then the appointed heir takes it subject to the residuary interest which resides in the appointer's reversioners. The property having descended from a common ancestor of the appointer and his reversioners, the latter have the same right of objecting to an alienation made by the appointee as they possessed with respect to an alienation by the appointer. As regards them, the property continues to be ancestral and they can protect their reversionary rights by vetoing an improper alienation (*vide* 12 P. R. 1892 (F. B.)) (2).

But we do not think that property, whether ancestral or self-acquired, of the appointer, received by the appointed heir, can be regarded as ancestral *qua* the latter's sons. As regards sons, ancestral property has been defined to mean property inherited from a direct male ancestor, and the point which we have to decide is whether the property in question fulfils the requirements of this definition.

It has, already, been pointed out that the appointer or his ascendant, who originally held the land, is not an ancestor of the appointee's son and it, therefore, follows that the property originally held by the former cannot be called ancestral property of the latter. If it once descends to, or comes into the hands of, the appointee's son, then it would be ancestral *qua* the

(1) 111 P. R. 1893 (*Wazira v. Kahna*).

(2) 12 P. R. 1892 (F. B.) (*Sita Ram v. Raja Ram*).

grandson for the very simple reason that it would be inherited from the appointee who is the common ancestor of the son and the grandson. The same remark does not apply to the property in the hands of the appointee.

The conclusion at which we have arrived can be supported on another ground. The definition of ancestral property already given involves the idea of inheritance and inheritance there means succession *ab intestato* and does not obviously include testamentary succession. Now it has been held in many cases that the appointment of an heir is tantamount to a gift which comes into operation on the death of the appointer and that the property received by the appointee should be regarded in the nature of a bequest.

As remarked by Sir Meredyth Plowden at page 231 in 50 *P. R.* 1893 (*F. B.*) (1). "the power of adoption, when validly exercised, has precisely the same effect as regards the *varisan* *ekjuddi* or presumptive heirs, as a valid transfer of the adoptor's land by gift to the adopted son would have: it operates in fact as a transfer of his land, but a transfer taking effect after the death of the donor instead of in his life-time." If this is the correct description of the mode in which the appointed heir gets the property then it is clear that he does not inherit it within the meaning of the above definition of ancestral property. The appointee is a legatee of the property and the son of a legatee has absolutely no right to control an alienation by the father of the property bequeathed to the latter.

We would now refer to two judgments which, it is contended by the learned pleader for the appellant, have adopted a different view.

The first case upon which reliance has been placed is that reported as 9 *P. R.* 1893 (2). It arose out of a suit brought by an adopted son to contest an alienation by his adoptive father, and the sole point which was decided was whether the adoptive father had a right to repudiate an adoption once validly made. Having decided it in the negative, the learned Judges remanded the case to the Divisional Judge for disposal with the remark that the adoption under the deed was valid and that the plaintiff's *locus standi* was established. The further question that, even if the adoption or appointment was valid, the appointed heir was not entitled to impeach the

(1) 50 *P. R.* 1893 (*F. B.*) (p. 231) (*Ralla v. Budha*).

(2) 9 *P. R.* 1893 (*Thamman Singh v. Jit Singh*).

alienation by his adoptive father because the property was not ancestral as regards him, was not raised by the parties and no opinion was therefore expressed on it.

The other case which requires notice is 51 P. R. 1906 (1), the *placitum* of which is to the effect that "by custom among Mahtons of Nawashahr *tahsil*, in the Jullundur District, the sons of an appointed heir who predeceased his adoptive father are entitled to succeed on the latter's death to his estate." With respect to this case, we would make two observations. In the first place, we find that the appointee was a nephew of the appointer and the former's sons were therefore agnates of the latter. In the second place, the learned Judges regarded the appointment of heir in the same light as a gift and remarked that "there can be no question that a gift, if valid, would benefit the donee's sons, whether the donee himself pre-deceased the donor or not." Looking at the case in the light of the above observations and having regard to its special facts we do not think it militates against the view taken by us about the nature of the property in the hands of an appointed heir.

It is, however, significant that in the case of *Kritrima* adoption which, as has been pointed out in several judgments of this Court, resemble the customary appointment of an heir in the Punjab, the Calcutta High Court has held that the sons of a person adopted in the *Kritrima* forms are not entitled to inherit the property of the adoptive father (*vide, inter alia*, 25, *Weekly Reporter*, 255). At page 258 (2) of the report the learned Judges make the following observations :—

"Under the Hindu Law as laid down in Macnaghten, "Volume I, page 76, and also in a decision of this Court in "Volume VIII of the *Weekly Reporter*, the relation of *Kritrima* "son extends to the contracting parties only, and the son so "adopted will not be considered the grandson of the adopting "father's father, nor will the son of the adopted be considered "the grandson of his adopting father." These observations are, in our opinion, equally applicable to the person appointed an heir under the Customary Law.

From the general principles of the Customary Law relating to the nature of the ancestral land and from the incidents of the customary appointment of heir, the result which we deduce is that the property in the hands of Jawala was not ancestral *qua* the plaintiff.

(1) 51 P. R. 1906 (*Chajju v. Dalipa*).

(2) (1876) 25 W. R. 255 (258) (*Baboo Juswant Singh v. Doolee Chand*).

We accordingly hold that the plaintiff's suit has been rightly dismissed by the Courts below and that this appeal must fail. The appellant must pay the costs of the respondent in this Court.

Appeal dismissed.

No. 100.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Scott-Smith.

SHUJA-UD-DIN AND OTHERS—(DEFENDANTS) —
APPELLANTS,

Versus

MUSSAMMAT ASHIABI—(PLAINTIFF)—
RESPONDENT.

Civil Appeal No. 1096 of 1910.

Court Fees Act, section 7 (IV) (f)—valuation of a suit asking Court to administer the estate of a deceased person and paying plaintiff her share—suit for accounts—Civil Procedure Code, 1908, order 20, rule 13—Suits Valuation Act, VII of 1887, section 8.

Held, that a suit asking the Court to administer the estate of a deceased person and paying plaintiff her share is a suit for accounts (*vide* rule 13, order 20, Civil Procedure Code) falling within section 7, IV (f) of the Court Fees Act and the plaint must bear *ad valorem* Court fee stamps according to amount at which the relief sought is valued therein.

Held also, that under section 8 of the Suits Valuation Act the value of the suit for purposes of jurisdiction is the same.

51 P. R. 1897, p. 229 (F. B.) (1), I. L. R. 10 Cal. 274 (282) (2) and 68 P. R. 1881 (3), referred to.

First appeal from the decree of J. Addison, Esquire, District Judge, Delhi, dated the 29th August 1910.

Santanam, for appellants.

Muhammad Shafi and Abdul Rashid, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—One Shahab-ud-Din died intestate on 1st December 1909. On 16th December his eldest son, Shuja-ud-Din (present defendant 1), applied to the District Court, Simla, for letters of administration, and on the following day that Court appointed him *ad interim* receiver. On 18th February 1910 his widow, present plaintiff, entered a *caveat*, and nine days later she filed the present suit in the Court of the District Judge, Delhi, asking the Court to administer the

14th July 1914.

(1) 51 P. R. 1897 (p. 229) (F. B.) (*Sardar Dial Singh v. Beli Ram*).

(2) (1884) I. L. R. 10 Cal. 274 (282) (F. B.) (*Anonymous Case*).

(3) 68 P. R. 1881 (*Mussammat Rukman v. Brij Mohan Lal*).

estate of the late Shahab-ud-Din and, *inter alia*, to give her her $\frac{1}{5}$ share in it.

In different parts of her plaint she valued at Rs. 2,80,000 the property left by deceased, and at Rs. 15,000 the suit "for purposes of jurisdiction," and at Rs. 130 for purposes of Court Fee; and on her plaint she affixed a Court Fee stamp of Rs. 10.

Apart from their pleas on the merits and on other points defendants urged that Court Fee should be *ad valorem* on Rs. 15,000, the value placed by plaintiff herself on her suit for jurisdiction purposes; and the Court below overruled the plea. It did not hold that Rs. 10 was the proper ultimate Court Fee; but in a way, not easy to follow, while applying Article 17, (vi), Schedule II, Court Fees Act, which prescribes a fixed fee of Rs. 10, it went on to say that, as parties admitted, "Court fee will have to be paid in full from the estate or otherwise, after the estate has been ascertained." The Court then proceeded with the case on the merits and having appointed Lala Mohan Lal, pleader, of Simla, receiver, gave plaintiff "the usual preliminary decree." This was on 28th August 1910, sixteen days before which date the Simla Court had stayed proceedings in defendant's case before it.

In appealing here defendants 1 and 2 again raise the question of Court Fee, and after hearing arguments we are constrained to allow their contention. We are unable to see any reason why such a suit as this should not be taken to be a suit "for accounts" within the meaning of the phrase in section 7 (iv) (f), Court Fees Act. The phrase is quite general; and, though the most common and familiar suits for accounts are suits for taking of partnership accounts and by principals against agents, we fail to see why a suit of the kind dealt with in Order 20, Rule 13 (1), Civil Procedure Code, which is exactly the suit we have here—*i.e.* "for an account of any property and for its due administration"—does not fall within the purview of Section 7 (iv) (f), Court Fees Act, aforesaid.

The distinction the Lower Court and Mr. Shafi (for plaintiff-respondent) seek to draw between a "suit for account" and a suit "for an account of any property" seems to us sophistical; and it follows that, inasmuch as the suit falls under the section and clause of the Court Fees Act just quoted, it cannot be governed by articles 17, (vi), Schedule II of that Act, which runs "every other suit where it is not possible to estimate at a money-value the subject-matter of the suit and which is not otherwise provided for by this Act."

Then looking at section 7 (*iv*) aforesaid, we see that stamp is to be paid *ad valorem* on "the amount at which the relief sought is valued in the plaint or memorandum of appeal."

Here plaintiff herself valued the suit for jurisdiction at Rs. 15,000, and, if we turn to section 8 of the Suits Valuation Act, 1887, we see that her valuation for Court Fee at Rs. 130 must be ignored. The valuation for both purposes must be the same, and clearly the valuation for jurisdiction, which led the lower Court to take the case on its own file and resulted in a first appeal to this Court, holds the field.

Our finding is that for all purposes this must be taken as one of Rs. 15,000 value, and plaintiff should have paid Court Fee of Rs. 625 on that amount. Similarly, defendants-appellants, who were quite justified in the circumstances in appealing on a Rs. 10 stamp will have to increase their Court Fee also to Rs. 625.

The above is the way we look at the case. We have looked at rulings quoted by Mr. Shafi, but they do not constrain us to change our opinion in any way

We are well aware of the views expressed at page 229 in 51, *P. R.* 97, (1), at page 282 of *I. L. R. Cal.* (2), and so forth, and we have no quarrel with the proposition that fiscal enactments should, where ambiguous, be construed in favour of the subject; but here we see no ambiguity or difficulty. We are also aware that in 68, *P. R.* 81 (3), an administration case, suit and appeal alike were apparently heard on a Rs. 10 stamp without demur on the part of defendants or Courts; but the question agitated before us was not there raised and the ruling therefore is no authority.

No doubt a suit for administration of an intestate estate is in some respects a suit of a unique kind, but after all it has many features in common with a suit for winding up an insolvent estate, or a suit for dissolution of partnership with taking of accounts and allotment to each partner after all debts, etc., are settled up, of his net share. In this connection we would refer to Civil Procedure Code, First Schedule, Appendix A, (3) Plaints, Forms 41, 42, 43 and 49; (4) Written statements, Form 14; Appendix Decree Forms 17, 18, 19, 20, 21, 22 (Final decree in partnership case). In all of these the taking of accounts is a prominent and necessary feature; and the mere

(1) 51 *P. R.* 1897 (p. 229) (*F. B.*) (*Sardar Dial Singh v. Beli Ram*).

(2) (1884) *I. L. R.* 10 *Cal.* 274 (282) (*F. B.*) (*Anonymous Case*).

(3) 68 *P. R.* 1881 (*Mussammat Fukman v. Brij Mohan Lal*).

fact that after accounts have been taken, the Court, *ex necessitate rei*, acts in winding up on rather different lines in the different classes of cases, does not take any of them out of the purview of the aforesaid phrase suit “for accounts.”

Plaintiff is said to be poor. Her learned Counsel asks for 3 months' time for payment and we grant this prayer. Within 3 months from to-day plaintiff must make up the Court fee on the plaint to Rs. 625. If she does so, defendants-appellants must be prepared on or before next date of hearing to make up *their* Court fee to a similar figure, if he wishes his appeal to be heard further. If plaintiff fails, no doubt her suit will have to stand dismissed. If she pays and defendants-appellants fail to pay, their appeal will stand dismissed.

Appeal dismissed.

No. 101.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

MAHARAJ KISHEN—(DEFENDANT)—APPELLANT,

Versus

HARGOBIND AND BASHESHA LAL—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 946 of 1912.

Hindu Law—joint family partnership—death of one of the partners—whether partnership dissolves—Indian Contract Act, section 253 (10)—partnership continued after death—Indian Limitation Act, IX of 1908, article 106.

The plaintiffs' firm of B. L. H., together with the firm of G. R. J. D., entered into a partnership with M. K., defendant, by deed dated 1st January 1901, under which the two firms were to supply the capital and M. K. was to act as manager, the profits being shared equally between the parties. The agreement was to remain in force for *three years* from the date of starting work. M. K.'s father G. M. by a separate bond stood security for all losses suffered by the two firms to the extent of his son's share.

The plaintiffs sued on the 22nd December 1910 alleging that the joint business was carried on up to the end of December 1907 and that thereafter business was only carried on for purpose of winding up and they prayed for accounts to be made up and for a decree against defendants M. K. and the representatives of his father, since deceased, (they having settled up with the firm of G. R. J. D.) for any sum due to them or in the alternative (if the Court found that the partnership had not yet been dissolved) that it should be dissolved and accounts made up and a decree passed in accordance therewith. The defendants pleaded *inter alia* that the suit was barred by limitation as the partnership had been dissolved more than three years before suit, and further that the surety-agreement by the late G. M. had determined on the lapse of the three years for which the partnership was to continue, *i.e.*, on the 1st January 1904.

Held, that as the partnership-agreement was between (a) M. K. of the one part and (b) the two firms of B. L. H. and G. R. J. D. of the second part and not between the five individuals who signed the deed in their personal capacities and as the three partners of the firm of G. R. J. D. constituted a joint Hindu family and the firm was consequently not dissolved by the death of one of the partners in July 1907, to whom one of the other partners succeeded by survivorship, the partnership in suit was not dissolved by such death.

The principle underlying section 253 (10) of the Indian Contract Act explained.

Held also that, as all the parties agreed expressly or by necessary implication to continue the partnership as if no dissolution had taken place upon the aforesaid death, the suit was in any case not barred under article 106 of the Limitation Act.

2 Ch. 474 (1) and 1. L. R. 25 Mad. 26 (31, 32) (2), referred to.

(1) (1895) 2 Ch. 474 (*Betjemann v. Betjemann*).

(2) (1901) 1. L. R. 25 Mad. 26 (31, 32) (*Ahinsa Bili v. Abdul Kader*).

Held further, that the extension of the partnership could not extend the liability of the surety who was no party to such extension and that his liability consequently ceased on the expiration of the period of three years, originally fixed in the deed of partnership.

First appeal from the decree of A. Latifi, Esquire, District Judge, Delhi, dated the 20th May 1912.

Sheo Narain and Madan Gopal, for appellants

Muhammad Shafi, for respondents.

The judgment of the Court was delivered by—

6th May 1914.

RATTIGAN, J.—Plaintiffs, Hargobind and Basheshar Lal, trading under the name of Basheshar Lal Hargobind, allege that by a written agreement, dated the 1st of January 1901, a contract of partnership was entered into between (1) Maharaj Kishen, defendant No. 4, of the one part, and (2) plaintiffs' firm and the firm of Ganga Ram Jamna Das, represented by defendants 1, 2 and 3 of the second part; that under the terms of this agreement the two said firms were to supply the capital for the business of the partnership; and that defendant No. 4 was to act as manager, the profits being shared equally by the two parties. The agreement was, according to paragraph 6, to remain in force for three years from the date of starting work. By a bond, dated the 27th of March 1901, Rai Bahadur Gursahai Mal, the father of defendant No. 4, undertook to stand security for all losses suffered by the two firms to the extent of defendant No. 4's share. The said surety died before suit and defendants Nos. 4, 5 and 6 represent his estate. Plaintiffs in their plaint, which was presented to the Court on the 22nd of December 1910, allege that the partnership in question was carried on up to the end of December 1907 and was dissolved on the 1st of January 1908, except in so far as the carrying on of the business was necessary for winding-up purposes. They further state that the representatives of the firm of Ganga Ram Jamna Dass have settled matters with themselves and are merely *pro forma* defendants in the present suit. The plaint further sets out that the business of the partnership was hopelessly mismanaged and that plaintiffs are entitled to claim a settlement of accounts from the late manager of the concern—Maharaj Kishen. They accordingly claimed the following alternative relief :—

- (a) that the partnership be wound up and after settlement of accounts a decree be passed in favour of plaintiffs for such sums as they might be found entitled to, and

(b) that in the event of the Court finding that the partnership had not been dissolved prior to institution of suit that it should now be dissolved, accounts made up and decree passed in accordance therewith.

The plaintiffs' claim was contested by defendants Nos. 4, 5 and 6 and a number of pleas were urged with which we are not concerned upon this appeal. The main ground of defence was that the claim was barred under article 106 of the Limitation Act inasmuch as the partnership had been dissolved more than three years before suit, and further that the agreement by Rai Bahadur Gursahai Mal to stand surety determined on the lapse of the period of three years for which the partnership was to continue in force according to the terms of the agreement, *i.e.*, from the 1st of January 1901 to the 1st of January 1904. Defendant No. 4 in his written pleas maintained that the partnership in question was dissolved by the death of Munna Lal, one of the partners in the firm of Ganga Ram Jamna Dass, who died in July 1907.

Subsequently, however, when giving evidence before the Court Maharaj Kishen deposed that the partnership remained in existence till November 1907, when it came to an end by arrangement between the partners. The District Judge found that the firm was dissolved at the death of Munna Lal in July 1907, but was continued after his death by mutual consent of the remaining partners, that in point of fact it was not dissolved till the 31st of December 1907, and that consequently plaintiffs' claim against defendant No. 4 was within time. On the other hand, the learned Judge held that the suretyship of Rai Bahadur Gursahai Mal determined after the lapse of the period of three years mentioned in the partnership agreement and that consequently plaintiffs had no claim against the estate of the late surety. A preliminary decree was passed in favour of plaintiffs on the 20th of May 1912 declaring that the partnership of the firm of Maharaj Kishen Basheshwar Lal was dissolved on the 31st of December 1907 and directing Maharaj Kishen, defendant No. 4, to file within one month a balance sheet showing profits and losses of the partnership.

From this decree Maharaj Kishen has appealed to this Court and on behalf of the appellant Mr. Sheo Narain, his Advocate, has declared that he gives up grounds 3 and 4 of the grounds of appeal and that his sole contention is that the claim is barred by time, on the ground that the partnership terminated either on the death of Munna Lal or in November

1907; and that in either case the suit was instituted more than three years after the cause of action accrued. The plaintiffs have also filed a cross-appeal taking exception to the finding of the District Judge that the surety bond of Rai Bahadur Gursahai Mal terminated upon the expiry of three years after the date of the partnership starting work.

We have heard lengthy arguments as to the date when the partnership between the parties actually terminated, but the question does not appear to us to be very difficult. The agreement by which the partnership was constituted is set out at pages 4 and 5 of part I of the paper-book, and upon a consideration of its terms, we have no hesitation in accepting Mr. Shafi's contention that the partnership was one between (a) Maharaj Kishen, of the one part, and (b) the two firms of Ganga Ram Jamna Dass and Basheshar Lal Hargobind, of the second part, and not (as contended by Mr. Sheo Narain) between the five individuals who signed the deed in their personal capacities.

It is further established by the evidence on the record and indeed not now contested that the firm of Ganga Ram Jamna Dass was constituted of three partners, *viz*, Munna Lal, Piyari Lal and Hardwari Mal. Munna Lal and Piyari Lal (uncle and nephew) constituted a joint Hindu family, so far at all events as their property was concerned, and when Munna Lal died in July 1907, Piyari Lal at once became his heir by the rule of survivorship and represented his estate for all purposes. Thus the death of Munna Lal in no way affected the partnership up to that moment existing between him, his co-parcener, Piyari Lal, and Hardwari Mal. Piyari Lal, his heir by survivorship, was at the time one of the partners. The principle of law embodied in section 253 (10) of the Indian Contract Act is based on the ground that partners cannot be expected to acquiesce in new partners being forced upon them. In the event of one partner dying, they may well object to the executors or administrators of a deceased partner coming into the business. But this principle can obviously not apply when all that happens is that one of the existing partners becomes by operation of law, entitled on the death of his co-parcener, to a larger share in the partnership than he previously possessed in his individual right. We hold, therefore, that the death of Munna Lal did not dissolve the partnership firm of Ganga Ram Jamna Dass and as a result, did not dissolve the partnership existing between Maharaj Kishen and the two firms of Ganga Ram Jamna Dass and Basheshar Lal Hargobind.

Mr. Sheo Narain contended that as a son was adopted to Munna Lal after the latter's death, Piyari Lal cannot be regarded as Munna Lal's heir. A son, no doubt, was eventually adopted to Munna Lal, but this happened admittedly after Munna Lal's death and there is nothing to shew that the adoption in question took place before the 31st December 1907. Some time obviously must have elapsed before the adoption was effected, and until it was completed, Piyari Lal was admittedly Munna Lal's heir.

But even if it be held that the death of Munna Lal had the technical effect of dissolving the partnership of which he was a member, it is clear from the evidence of Maharaj Kishen himself that all parties agreed, expressly or by necessary implication, to continue the partnership as if no dissolution had taken place. Possibly, the legal effect of such agreement would be the creation of a new partnership. But even so it is obvious that the new partnership was founded on the basis of taking up matters exactly as they stood at the time of Munna Lal's death and of carrying on the business upon the understanding that the accounts of the old partnership were to be incorporated just as they were into the new partnership. Maharaj Kishen when giving evidence in Court expressly admitted that the partnership between the parties remained in existence till November 1907, whereas Munna Lal had, to the knowledge of all parties, died in July 1907. Presumably, Maharaj Kishen is well aware of the legal proposition that the death of one partner, in the absence of a contract to the contrary, terminates a partnership, and his meaning therefore must be that the parties either did not regard the death of Piyari Lal's co-partner as dissolving the partnership, or that if they did, they agreed to continue the partnership just as if no such dissolution had taken place. In either event, the provisions of article 106 of the Limitation Act would not bar the present claim, for as held in *Beljemann v. Beljemann* (1895, 2 Ch. 474) (1), "when a partnership is "determined by death and the surviving partners continue to "carry on the business, the statute of limitation is no bar to "taking the accounts of the new partnership by going into the "accounts of the old partnership which have been carried on "into the new partnership without interruption or settlement," (see also *I. L. R. 25 Mad.* at pages 31, 32) (2).

But the present suit was not instituted till the 22nd of December 1910 and the claim would consequently be still barred

(1) (1895) 2 Ch. 474 (*Beljemann v. Beljemann*).

(2) (1901) *I. L. R. 25 Mad.* 26 (31, 32; *Ahinsa Bibi v. Abdul Kader*).

by article 106 of the Limitation Act if defendant's allegation is true that the partnership was finally dissolved by consent of parties in November 1907. In our opinion this allegation is not true, and we cannot concede the right of defendant to put it forward. He has had to admit in his evidence that he himself issued notices to constituents of the firm informing them that the partnership was dissolved from the 1st January 1908, and it is not open to him now to contend that this was in fact false and that the partnership had actually terminated in November 1907. But apart from this objection, it is clear from the evidence of his own witness (Gonjeveram, D. W. 3) that about the end of 1907, he went to Calcutta to arrange for the further financing of the business. Clearly, then, the partnership had not terminated up to the time of defendant's visit to Calcutta which took place in November or December 1907. Then again, in his letter to plaintiffs, dated 16th of January 1908 (exhibit P. 8) he states "I did no new business after the 31st December "as desired by you." The inference is obvious that plaintiffs had instructed him to close the business of the partnership with effect from the 1st January 1908, an inference which becomes irresistible when we read with this letter the notices admittedly issued by defendant to the firm's constituents.

We hold, therefore, that the present suit is not barred by article 106 of the Limitation Act and that defendant's appeal must be dismissed.

There remains the cross-appeal by plaintiffs, and here again we agree with the District Judge's conclusions. The surety bond executed by Rai Bahadur Gursahai Mal must be read in conjunction with the partnership agreement to which it makes express reference, and under the provisions of paragraph 6 of that agreement the partnership was to continue in force for the period of three years, though it was terminable earlier. A bond of this kind is to be construed strictly, and the liability of the surety cannot be extended beyond the period for which he was undertaking liability simply by showing that the partnership, which he was led to believe was to terminate within three years, was in fact, by mutual agreement of the partners, to which he was no party, continued beyond that period. Mr. Shafi relies upon the words in the bond:—"During the time the said "firm or any branch of it constituted hereafter carries on any "business," etc., as indicating that the surety undertook liability for an indefinite period. In our opinion, these words must be read subject to the provision in the partnership agreement that the period of the partnership was to be three years, unless it was terminated *earlier*.

We accordingly dismiss the cross-appeal also.

Both parties agree that in the circumstances they should be left to bear their own costs upon these appeals and we direct accordingly.

Appeal dismissed.

No. 102.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shadi Lal.

DIWAN CHAND—(DEFENDANT)—APPELLANT,

Versus

HARI CHAND AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 609 of 1912.

Civil Procedure Code, 1908, section 11, explanation IV—res judicata—suit by mortgagee to redeem from sub-mortgagee who has purchased equity of redemption—subsequent suit by latter to redeem the mortgage.

In 1858 one W. mortgaged his house to W. J. for Rs. 101. In 1873 W. J. sub-mortgaged half the house to R. R. S. for Rs. 50-8. In 1886 W. sold his equity of redemption to the sub-mortgagee R. R. S.

In 1909 the representatives of W. J. sued the representatives of R. R. S. for possession of the house by redemption of the sub-mortgage. In that suit the latter pleaded that the transaction was not a mere sub-mortgage but a transfer of half the mortgage rights and also that they were owners of the equity of redemption. The question as to the genuineness of the alleged sale of the equity of redemption was put in issue and decided in favour of the defendants. It was however held that the plaintiffs could still redeem the sub-mortgage which had not been extinguished by the sale of the equity of redemption, but that the sub-mortgagee was entitled to some Rs. 426 as compensation for improvements. The defendants now sue as owners of the equity of redemption, to redeem the mortgage in favour of W. J., the defendants (plaintiffs in the previous suit) again plead that the alleged sale was not genuine and the plaintiffs are not entitled to redeem.

Held, that the question whether the sale of the equity of redemption was genuine or not was not *res judicata*, as it was not a necessary issue for the decision of the previous case.

Held also, that the suit was not barred under explanation IV of section 11 of the Code of Civil Procedure, by reason of plaintiffs (then defendants) not having claimed to redeem the mortgage of W. J. in the previous suit.

2 *All. L. J.* 278 (1) distinguished; 17 *Cal. W. N.* 605 (*P. C.*) (2), referred to.

(1) (1905) 2 *All. L. J.* 278 (*Chet Ram v. Baru Mal*).

(2) (1913) 17 *Cal. W. N.* 605 (*P. C.*) (*Lala Soni Ram v. Kanhaiya Lal*).

*Second appeal from the decree of E. A. Estcourt, Esquire,
Divisional Judge, Attock, dated the 6th January 1912.*

Gobind Das, for appellant.

Sheo Narain, for respondents.

The judgment of the Court was delivered by—

3rd June 1914.

RATTIGAN, J.—The facts of this case are simple, though the questions of law involved are not free from difficulty. In 1858 one Wasti mortgaged a house to Wanjara (the predecessor in interest of defendant Diwan Chand) for Rs. 101. Subsequently in 1873 Wanjara sub-mortgaged half of the house to Ram Rattan Shah for Rs. 50-8. In 1909 Diwan Chand sued present plaintiffs (who are the representatives of Ram Rattan Shah) for possession of the property by redemption of the sub-mortgage. The then defendants pleaded in effect that the transaction with their predecessor was not a mere sub-mortgage but really an assignment of Wanjara's mortgagee rights, and that in 1886 Wasti had sold the equity of redemption in respect of the property in suit to their ancestor, Ram Rattan Shah. The question whether the alleged sale of the equity of redemption was genuine or not was put into issue and decided by the Divisional Judge in favour of the then defendants. It was held, however, despite this finding, that the then plaintiffs were entitled to a decree, inasmuch as the sub-mortgage had not been extinguished by the sale of the equity of redemption. It was further held that the sub-mortgagee was entitled to a sum of about Rs. 426 as compensation for improvements made on the property during the 35 years or so that he had been in possession.

The then defendants are plaintiffs in the present suit and they now claim, as owners of the equity of redemption, to redeem the mortgage effected in favour of Wanjara by Wasti. Defendants, who were the plaintiffs in the previous suit, again plead that the alleged sale by Wasti was not genuine and that plaintiffs are not entitled to redeem. The lower Courts have held that the question of the genuineness of the sale is *res judicata* by reason of the decision in the previous case and upon this finding have granted plaintiffs a decree for redemption. Two points have been urged before us on behalf of the appellant :—

- (1) that the question of the genuineness of the sale is not *res judicata*, inasmuch as it was not a question the decision of which was necessary for the purposes of the prior suit ; and

- (2) that plaintiffs are debarred by explanation IV of section 11, Civil Procedure Code, from bringing the present suit, inasmuch as they ought in the previous suit to have claimed redemption of Wanjara's mortgage and thereby defeated the then plaintiff's claim.

Upon the first question we agree with Mr. Gobind Das that the genuineness or otherwise of the sale-deed in favour of plaintiffs cannot be held to be *res judicata*, once it was held in the former suit that the transaction between Wanjara and Ram Rattan Shah amounted to a sub-mortgage and not to an assignment to the latter of the former's mortgage, the representative of Wanjara was entitled to redeem the sub-mortgage, and the question whether Ram Rattan Shah had or had not purchased Wasti's equity of redemption was irrelevant.

Mr. Sheo Narain realizing this, has urged that the question of the genuineness of the sale was a matter directly and substantially in issue in the previous case because the then defendants pleaded that they had in the *bona fide* belief that they were owners, expended large sums in improving the property. No doubt a plea to this effect was urged, but obviously it was not necessary for the Court in determining that plea to decide more than that Ram Rattan Shah was entitled to the compensation claimed because he had acted in good faith believing himself to be the owner.

It was unnecessary (and indeed would have been fatal to any claim for compensation) to go further and to hold that, in point of fact, the sale was genuine and that he was actually the owner. We hold accordingly upon the first point in favour of the appellant.

As regards the second point, Mr. Gobind Das relies mainly upon a decision of the Allahabad High Court reported in *11 All. L. J.* p. 278 (1). The facts of that case are not altogether on all-fours with those of the case before us, but unquestionably there are remarks in the judgment which support the argument that in the previous case Ram Rattan Shah ought to have claimed to redeem the mortgage in favour of Wanjara and that having failed to do so, he and his representatives are now debarred from claiming redemption. With every respect we are unable to accept this exposition of the law, and we are of opinion that the decision

of their Lordships of the Privy Council in *Lala Soni Ram v. Kanhaiya Lal*, 17, C. W. N. 605 (1), supports the view that we take. At page 610 their Lordships make the following remarks :—

“The Subordinate Judge held, and rightly as their Lordships consider, that the suit of 1904 did not by the operation of section 13 of the Code of Civil Procedure bar the present suit. The suit of 1904 was a suit by Lala Shib Shankar Lal and Babu Charan Behari Lal for possession as mortgagees. The mortgage had not been redeemed and plea of Lala Soni Ram that he was entitled to redeem was irrelevant to a suit by the usufructuary mortgagee for possession. *Lala Soni Ram's title as mortgagor was not in question in that suit, nor could he as a defendant to that suit, have converted that suit into one in which he could have obtained a decree for redemption.*”

So in the present case we do not see how it was open to Ram Rattan Shah, as a defendant to a suit brought by Wanjara, to claim redemption of Wanjara's mortgage.

It must be remembered that in the previous suit the rights of Wasti, the mortgagor, were not denied by the then plaintiff and his claim to redeem the sub-mortgage in favour of Ram Rattan Shah was not in any sense inconsistent with the subsisting rights of the original owner of the property. We accordingly decide this point against the appellant.

The result is that we accept this appeal and remand the case under order XLI, rule 23, Civil Procedure Code, to the Court of the Divisional Judge, Attock Division, who in turn will remand it for decision on the merits to the Court of the Munsif. Costs will abide the event.

Appeal accepted.

No. 103.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shadi Lal.

AMAR SINGH—(PLAINTIFF)—APPELLANT,

Versus

KISHEN SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 141 of 1912.

Pre-emption—collateral suit.

One D. S. sold the land in dispute to K. S. for Rs. 5,000. On the last day of limitation H. S. and S. S., co-proprietors in the *patti*, brought a suit for

(D (1913 17 Cal. W. N. 605 (P. C.) (*Lala Soni Ram v. Kanhaiya Lal*).

pre-emption claiming that the price was not fixed in good faith and offering to pay Rs. 2,000 or market value. On the same day and immediately after the institution of the first suit A. S., brother of the vendor, also instituted a suit for pre-emption offering to pay the full price of Rs. 5,000. The latter's superior right of pre-emption was admitted, but the Divisional Court dismissed his suit on the ground that he was acting in collusion with the vendee and in the latter's interest.

Held that before the suit of A. S. could be dismissed on the ground of its being collusive, it should have been shewn by the strictest evidence that the object of A. S. was really to secure the land for the vendee and a desire to annoy and defeat a rival pre-emptor was not sufficient.

139 P. R. 1894 (1), 19 P. R. 1898 (2), 10 P. R. 1902 (3), 67 P. R. 1907 (4), 87 P. R. 1896 (5), 7 P. R. 1912 (6), and 58 P. R. 1912 (7), referred to.

Further appeal from the decree of H. Scott-Smith, Esquire, Divisional Judge of the Ferozepore Division, dated the 23rd day of November 1911.

Appellant, in person.

Ganpat Rai, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—The dispute with which this appeal is **17th June 1914.** concerned is one between rival pre-emptors and arose as follows :—

On the 16th of March 1910 Dana Singh sold the land in dispute to Kishen Singh, vendee, for an alleged consideration of Rs. 5,000. On the last day of limitation Harnam Singh and Sandar Singh, who are proprietors in the village and in the *patti*, brought a suit for pre-emption claiming that the price had not been fixed in good faith and offering to pay Rs. 2,000 or market value. On the same day and immediately after the institution of the first suit, Amar Singh, brother of the vendor, also instituted a suit for pre-emption offering to pay the full price of Rs. 5,000. The rival pre-emptors were impleaded as co-defendants against each other in the suits, both of which were tried together with the consent of the parties.

It is not denied that Amar Singh's right of pre-emption is superior to that of his rivals, but his claim has been

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- (1) 139 P. R. 1894 (*Brij Nath v. Jita*).
 (2) 19 P. R. 1898 (*Ramsukh Das v. Fazal-ud-Din*).
 (3) 10 P. R. 1902 (*Jivan Singh v. Sher Singh*).
 (4) 67 P. R. 1907 (*Manohar Lal v. Pars Ram*).
 (5) 87 P. R. 1896 (*Ahsan Ullah v. Jawahir Lal*).
 (6) 7 P. R. 1912 (*Mahmud Bakhsh v. Hassan Bakhsh*).
 (7) 58 P. R. 1912 (*Sheru v. Jawahir Singh*).

dismissed by the District Judge and by the Divisional Judge on appeal on the ground that he is acting in collusion with the vendee and in the latter's interest. The grounds upon which this opinion is based are—

- (1) that Amar Singh has expressed his readiness to pay the full amount of Rs. 5,000 in respect of land which, according to his own statement made in another suit in 1906, cannot be worth more than about Rs. 750;
- (2) that Amar Singh is deep in debt and will find difficulty in raising the money for purchasing the property; and
- (3) that he filed the suit in a hurry and with the obvious intention of defeating the rival pre-emptors.

The learned Divisional Judge has referred to certain rulings of this Court, but, despite the principles therein laid down, holds that this is a very exceptional case and that consequently those principles do not apply.

In our opinion, the grounds upon which the Courts have held that suit to be collusive are devoid of any real force and do not prove that the pre-emptor is seeking the benefit not of himself but of the vendee. It is quite possible that his motive is to annoy and defeat his rivals and, in any event, it would have to be shown by the strictest evidence that his object was really to secure the land for the vendee. In our opinion, having regard to the rulings of this Court (see 139 *P. R.* 1894 (1), 19 *P. R.* 1898 (2), 10 *P. R.* 1902 (3), 67 *P. R.* 1907 (4), 87 *P. R.* 1896 (5), 7 *P. R.* 1912 (6), and 58 *P. R.* 1912 (7)), the claim of Amar Singh should have been decreed and we accordingly accept his appeal.

He will be granted a decree for pre-emption conditional on his paying into Court a sum of Rs. 5,000 within 90 days from the date of this decree. In the event of his failing to do so, his suit shall stand dismissed and plaintiffs Harnam Singh and Sundar Singh will be granted a decree for pre-emption conditional on payment into Court of Rs. 2,500 within 30 days

(1) 139 *P. R.* 1894 (*Brij Nath v. Jita*).

(2) 19 *P. R.* 1898 (*Ramsukh Das v. Fazal-ul-Din*).

(3) 10 *P. R.* 1902 (*Jawan Singh v. Sher Singh*).

(4) 67 *P. R.* 1907 (*Manohar Lal v. Pars Ram*).

(5) 87 *P. R.* 1896 (*Ahsan Ullah v. Jawahir Lal*).

(6) 7 *P. R.* 1912 (*Mahmud Bakhsh v. Hassan Bakhsh*).

(7) 58 *P. R.* 1912 (*Sheru v. Jawahir Singh*).

after the expiry of the said period of 90 days. In default, their suit also to stand dismissed. We direct that the costs of all parties shall be borne by themselves throughout this litigation.

Appeal accepted.

No. 104.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shadi Lal.

RANJHA AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

MUSSAMMAT JINDWADDI AND GHULAM HUSSAIN—
(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 771 of 1911.

Custom—succession—collaterals 5th degree—sister—Gurmani Biloches—Muzaffargarh District—Riwaj-i-am.

Held, that the plaintiffs collaterals in the 5th and 6th degree had failed to prove that by custom among Gurmani Biloches, Muzaffargarh District, they had a preferential right of succession to a sister.

Held also, that the entry in the *Riwaj-i-am* in favour of the sister threw the *onus probandi* upon the collaterals.

Held further, that the plaintiffs had also failed to prove that the sister had lost her preferential right of succession by marrying outside the *khandan*.

Further appeal from the decree of M. L. Waring, Esquire, Divisional Judge, Multan Division, dated the 9th February 1911.

Kanwar Narain, for appellants.

Badr-ud-Din, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—The parties are Gurmani Biloches of the Muzaffargarh District and the two questions involved on this appeal are (1) whether the collaterals in the fifth and sixth degree have a right to succeed in preference to a sister of the deceased proprietor; and (2) whether if an unmarried sister has a preferential right, a sister who has married a *ghair kaum* or a person outside her brother's family has not also such a right.

The Divisional Judge has decided both points in favour of the sister, and the plaintiffs, who are deceased's collaterals, have appealed to this Court.

The evidence on the record is scanty and of no great value apart from the *Riwaj-i-am*. This latter (see page 36 of the

1st July 1914.

Customary Law, Muzaffargarh District) is admittedly in favour of the sister succeeding in preference to collaterals so remotely related as the plaintiffs. It is contended however that as no instances are given in support of the proposition laid down in the *Riwaj-i-am*, the rule as there stated cannot be accepted as correct. We cannot agree with this contention.

The *Riwaj-i-am* is one that was prepared, as the compiler notes in his preface, with very great care and every endeavour was made to obtain a true and accurate record of the people's customs. The entry in the *Riwaj-i-am* throws the *onus probandi* on the plaintiffs and we agree with the Divisional Judge that they have not been able to relieve themselves of this burden. Relying, therefore, on this entry we hold that the customary rule is, that a sister succeeds in preference to collaterals related in the 5th and 6th degree.

The next question is whether a sister who has married outside the *khandan* has a similar right. Here again the burden of proving, that marriage outside the family would deprive a sister of a right which she would otherwise have, lay upon the plaintiffs and admittedly there is no evidence adduced by them which establishes their contention to the contrary. We are satisfied, therefore, that the decision of the Divisional Judge was correct and the very fact that Mussammat Jindwaddi has been in undisturbed possession of this property for some ten years prior to suit is a strong indication of the consciousness of plaintiffs that their claim was exceedingly weak.

We dismiss the appeal with costs.

Appeal dismissed.

No. 105.

Before Hon. Mr. Justice Chervis and Hon. Mr. Justice Shadi Lal.

FAZL KHAN—(DEFENDANT)—APPELLANT,

Versus

MUSSAMMAT KARM BEGAM—(PLAINTIFF)—
RESPONDENT.

Civil Appeal No. 643 of 1912.

Muhammadian Law—dower—large amount claimed as fixed dower—verbal contract—evidence—whether Court can decree customary amount, when dower was fixed.

Held, that a verbal contract for a dower of a large sum can be admitted only if proved by most clear and satisfactory evidence.

Held also, that where both plaintiff and defendant are agreed that there was a *fixed* dower, the dispute is confined to its amount and the Court cannot go into the question as to what would be a proper dower. If the plaintiff fails to prove that the amount alleged by her was fixed, the Court can only decree the amount admitted by defendant.

Held further, that the rules of procedure and evidence laid down in the *Hidaya* to be followed in deciding disputes as to dower between husbands and wives, being at variance with the statute law on the subject, cannot be followed by Courts in India.

4 W. R. 110 (1), referred to.

First appeal from the decree of R. W. E. Knowllys, District Judge, Attock, dated the 28th February 1912.

Fazal-i-Hussain, for appellant.

Gobind Das, for respondent

The judgment of the Court was delivered by—

SHADI LAL, J.—This appeal arises out of a suit brought 27th July 1914. by Mussammatt Karam Begam, who is respondent in this Court against her husband, Fazl Khan, appellant, for recovery of her prompt dower. The allegations in the plaint are that the plaintiff's dower was fixed at the time of the marriage, that the amount which the defendant agreed to pay was Rs. 10,000 and 100 gold *mohars*, being of the value of Rs. 25 each, that half of this amount was prompt dower and that the plaintiff is, therefore, entitled to Rs. 6,250. The defendant pleaded, *inter alia*, that the dower was fixed at Rs. 100 and one gold *mohar* of the value of Rs. 18 and that the prompt dower was therefore Rs. 59, which the defendant was willing to deposit in Court. The Court of first instance held that the plaintiff had failed to prove that the amount mentioned in the plaint had been fixed as plaintiff's dower and, after enquiry by a commissioner into the amount of *mehr-ul-misl*, or customary dower, fixed it at Rs. 3,000 and consequently passed a decree for Rs. 1,500 on account of prompt dower.

The defendant has preferred a first appeal from this decree and the point pressed before us is that the District Judge had, on the pleadings, no authority to go into the question of customary dower.

Before dealing with this contention, it is necessary to decide the question raised by Mr. Gobind Das for the respondent in support of the decree of the lower Court that the evidence

(1) (1865) 4 W. R. 110 (*Shah Nujumooddeen Ahmed v. Beebee Hossainee*).

on the record proves that the amount stated in the plaint was agreed upon at the time of the marriage. After giving our careful consideration to the arguments of the learned pleader we have no hesitation in concurring with the District Judge that the plaintiff's allegation has not been established. There is no document in support of it, and the oral evidence is meagre and interested and it is contradicted by the witnesses examined by the commissioner.

A verbal contract for a dower of a large sum can be admitted only if proved by most clear and satisfactory evidence (4 W. R. p. 110) (1), and evidence of this character is wholly wanting in the present case. On the material before us, we are unable to come to a finding in favour of the plaintiff, and must accept the view of the District Judge that the amount of dower as stated by the plaintiff has not been proved.

We now come to the real point in the case, *viz.*, on the allegations in the plaint is the Court authorized to determine the amount of *mehr-ul-misl* and pass a decree for the sum so determined? As stated already, the plaintiff clearly alleged in the plaint, and this allegation was repeated in the statement of the plaintiff's agent before the settlement of issues, that the dower had been fixed, and on this point the defendant was at one with the plaintiff. Both the parties were agreed that this was a case of fixed dower and no issue, therefore, arose as to whether there was an express contract between the parties specifying some dower. The dispute was confined to the *amount* said to have been fixed, each party stating its own figure.

Now, Muhammadan Law lays down the rule that, if no dower is specified at the time of the marriage, the wife is entitled to a proper dower, *i.e.*, to an amount to be fixed by the Court after taking evidence as to what has usually been settled on other female members of the wife's father's family. Can we in this case say that no dower was specified? We think not. When it is admitted that the dower was stipulated for but the amount alleged by the plaintiff has not been proved, then it is clearly not a case in which no dower was specified.

The only authority which has a direct bearing upon the point before us is a judgment of the Calcutta High Court reported as 4 W. R. p. 110 (1). In that case, the plaintiff failed to prove her allegation that the dower promised by the

(1) (1865) 4 W. R. 110 (*Shah Nujumooddeen Ahmed v. Beebee Hosseinee*).

husband was Rs. 65,000, and the High Court, though being of opinion that the allegation of the defendant, that the amount was fixed at Rs. 1,000, was not established, passed a decree for that sum simply because it was admitted by the defendant. As regards the point, whether the Court can pass a decree for customary dower, the learned Judges observed that, as the case was put on a distinct contract, the Court was right in trying it on that issue only, and they did not, therefore, determine the amount to which the plaintiff might have been entitled with reference to the customary dower. Mr. Gobind Das has not been able to show any reason why that judgment which, in our opinion, contains a correct exposition of the law should not be followed. He has referred us to certain passages in the *Hidaya* which lay down rules of procedure and evidence to be followed in deciding disputes as to dower between the husband and the wife. But these rules, which are at variance with the statute law on the subject, cannot, it is manifest, be followed by Courts in British India.

The present case is undoubtedly based upon a contract entered into between the husband and the wife, but the term which deals with the amount of dower has not been proved. A finding against the plaintiff as to her allegation about the sum stipulated to be paid does not lead to the conclusion that no contract of dower was entered into, or that no sum was fixed. The contract is there, and in the event of the plaintiff not proving the amount asserted by her, the Court must, according to the rules of procedure, pass a decree for the sum admitted by the defendant. In this view of the law, it appears to us that the discussion as to customary dower which could only be allowed if there were no express contract, is beside the point, and we therefore consider it unnecessary to deal with it.

For the aforesaid reasons we accept the appeal of the defendant and, in modification of the decree of the District Judge, we pass a decree for Rs 59, the sum admitted by the defendant. Having regard to all the circumstances of the case, we direct that the parties bear their own costs in all Courts.

Appeal accepted.

No. 106.

*Before Hon. Sir Alfred Kensington, Kt., Chief Judge,
and Hon. Mr. Justice Chevis.*

JANGLI MAL—(PLAINTIFF)—APPELLANT,

Versus

PIONEER FLOUR MILLS—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 463 of 1911.

Assignment—claim for damages for breach of contract—right of assignee to sue—Transfer of Property Act, IV of 1882, sections 3, 6 (c), 130—“actionable claim”—“mere right to sue.”

Held, following I. L. R. 36 Cal. 345 (F.B.) (1) that a claim for damages for breach of contract, after breach, is not an actionable claim within the meaning of section 3 of the Transfer of Property Act, but a “mere right to sue” within the meaning of section 6 (c) and cannot therefore be transferred.

First appeal from the decree of J. P. Thompson, Esquire, District Judge, Lahore, dated the 7th February 1911.

Shadi Lal, for appellant.

Sheo Narain and Dhanpat Rai, for respondent.

The judgment of the Court was delivered by—

30th July 1914.

SIR ALFRED KENSINGTON, C. J.—The facts of this case are very simple. In August 1907 the defendant-company of Lahore contracted for delivery of various large consignments of flour to a Delhi merchant named Shambhu Nath. There were some deliveries and the contracts then fell through. The defendant's explanation, not so far accepted by the plaintiff, is that the contracts required delivery at Lahore within 15 days, and that Shambhu Nath was bound to make all arrangements for freight to Delhi; that he failed to make such arrangements and consequently did not take delivery; and that the defendant ceased therefore to be liable for Shambhu Nath's losses, if any, through non-delivery in time.

Shambhu Nath took no action for recovery of damages on breach of contract, and became insolvent in 1909. In August 1910 the Receiver of the insolvent's estate at Delhi sold Shambhu Nath's rights under the contract to one Hardwari Lal for Rs. 1,000 and he re-sold immediately to the present plaintiff for the same sum, filing the present speculative suit for damages, about Rs. 12,000, shortly afterwards.

The District Judge has dismissed the suit finding that it did not lie. He referred to various rulings, but not to the one which is exactly in point contained in *I. L. R. XXXVI Cal. 345 (Full Bench) (1)*. Counsel for the plaintiff-appellant is unable to dispute the applicability of the ruling now quoted,

(1) (1909) *I. L. R. 36 Cal. 345 (F. B.) (Abu Mahomed v. S. C. Chunder)*.

and has therefore confined his argument to an attempt to show that the law has not been there laid down correctly so far as Indian Courts are concerned.

The circumstances of the Calcutta case are precisely similar, in that the plaintiff there, as here, was a transferee from the purchaser of rights in an insolvent estate from the Official Assignee of Bombay, through an intermediate purchaser, and was seeking to enforce a claim for damages on an unfulfilled contract. The learned Judges discussed the matter with reference to the terms of section 3, 6 (e), and 130 of the Transfer of Property Act, IV of 1882, and, though this Act is not in force in the Punjab, we consider that we should follow its provisions in a case like the present not otherwise specifically covered by law.

Put shortly, plaintiff's difficulty is that his suit does not embrace an "actionable claim" to debt as defined in section 3 of the Act, inasmuch as, by section 6 (2), a mere right to sue cannot be transferred. Section 130 takes the matter no further, as it merely prescribes the procedure by which transfer of an actionable claim shall be effected, without fresh definition of the crucial words "actionable claim." In every case of the kind it has therefore to be determined whether the claim is actionable or not. We have no hesitation in saying that, in the absence of other authority, we should follow the learned Judges of Calcutta, and that we must therefore hold the present claim to be not actionable, because it is expressly prohibited by section 6 (e).

We are not pressed by counsel's argument by analogy from the provision of the Insolvency Act constituting a Receiver in insolvency an assignee with right to sue. The law there gives statutory permission to the Receiver by section 120 (d) of the Insolvency Act, with an express limitation that even he can only sue as assignee with leave of the Court. The analogy, such as it may be, cannot hold good in the case of the present plaintiff.

We observe further that the present case is even stronger than that discussed in the Calcutta ruling, as here there has been delay of over three years before instituting the suit for damages. That, however, touches plaintiff's case on the merits, and the point need not be discussed in view of our finding that he has no right to sue at all.

The plaintiff's appeal is accordingly dismissed with costs to the defendant-respondent.

Appeal dismissed.

No. 107.

Before Hon. Mr. Justice Scott-Smith.

LIVINGSTONE—(DEFENDANT)—PETITIONER,

Versus

FEROZ DIN—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 890 of 1913.

Indian Contract Act, IX of 1872, section 43—joint tenant—liability of each to pay the whole rent—Civil Procedure Code, 1908, order 1, rule 10—discretionary power of Court to order other tenant to be added as a co-defendant.

Held, that under section 13 of the Indian Contract Act, joint tenants are jointly and severally liable to pay the rent and it is open to the landlord to sue one or both of them.

I. L. R. 22 All. 307 (1), I. L. R. 25 Bom. 378 (386) (2), and 37 P. R. 1902 (3), referred to.

12 Cal. L. J. 642 (4), and 12, Cal. L. J. 591 (5), distinguished.

Held also, that although the Court had discretionary power under order 1, rule 10, of the Code of Civil Procedure to order the other tenant to be made a co-defendant, it was right in not making such an order when the whereabouts of the other tenant were not known.

Petition for revision of the decree of Lala Diwan Chand, Judge, Small Cause Court, Lahore, dated the 5th July 1913.

Morton, for petitioner.

Raghnath Sahai, for respondent

The judgment of the learned Judge was as follows :—

10th Nov. 1914.

SCOTT-SMITH, J.—The petitioner, Mr. Livingstone, and a certain Mr. Dick jointly leased a bungalow in Lahore from Feroz Din, plaintiff-respondent, for one year from 1st October 1912 at a rental of Rs. 80 a month, *plus* Rs. 8 a month for the *mali's* pay. The suit out of which the present application for revision arises was brought by the plaintiff against Mr. Livingstone alone for Rs. 88 on account of the rent for the month of May 1913. It was stated in the plaint that the other tenant had left Lahore and there was no clue to his whereabouts. The defence was that the landlord was not entitled to bring the suit against one of the two joint tenants and to realise the whole rent from him. The Court below on the authority of section 43 of the Indian Contract Act disallowed defendant's objections and decreed the claim.

(1) (1900) *I. L. R. 22 All. 307 (Muhammad Askari v. Radhe Ram Singh).*

(2) (1901) *I. L. R. 25 Bom. 378 (Dick v. Dhunji Jaithu).*

(3) *37 P. R. 1902 (Jag Lal v. Shib Lal).*

(4) (1910) *12 Cal. L. J. 642 (Kasi Kinkar Sen v. Satyendra Nath).*

(5) (1910) *12 Cal. L. J. 591 (Sir Rameswar Singh v. Jaidab Jha).*

Mr. Morton, on behalf of the petitioner, refers to the ruling reported in Volume XII of the Calcutta Law Journal at page 642 (1). In that case an earlier ruling of the Calcutta High Court, printed at page 591 (2) of the same volume, was referred to in which it was held that it was competent to a plaintiff landlord to maintain his suit against any number of several joint tenants. In the ruling cited by Mr. Morton the Judges were of opinion that the rule was stated in too comprehensive terms in the earlier ruling and they went on to state, "we may add that even if it could be laid down that ordinarily a landlord may make one of several joint tenants responsible for the whole rent, the doctrine would be inapplicable to the present case for two special reasons." The learned Judges then went on to state the special reasons which existed in that case. They did not lay down that a landlord must always sue all his joint tenants in one suit.

Section 43 of the Indian Contract Act is as follows:—

"When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise." It was laid down in *I. L. R. 22 All.*, page 307 (3), that the effect of this section was to exclude the right of a joint contractor to be sued along with his co-contractors, and that the rule laid down in the cases of *King versus Hoare* (a) and *Kendall versus Hamilton* (b) is no longer applicable to cases arising in India. Similarly in *I. L. R. 25 Bom.*, page 378, at page 386 (4) it was held that section 43 of the Contract Act takes away the right of a joint debtor to be sued jointly. But the learned Judge went on to point out that it was open to the defendant to apply to the Court for joinder of a person who ought to have been included in the action as a co-defendant and that the Code of Civil Procedure gives the Court absolute discretion to add or to refuse to add a party. In *37 P. R. 1902* (5), it was held that in a suit upon a contract made by a partner on behalf of the partnership the promisee can compel all or any one of such partners to perform the whole of the promise, and that non-joinder of a co-promisor is no ground of defence to such a suit.

(1) (1910) 12 Cal. L. J. 642 (*Kasi Kinker Sen v. Satyendra Nath*).

(2) (1910) 12 Cal. L. J. 591 (*Sir Rameswar Singh v. Jaidab Jha*).

(3) (1900) *I. L. R. 22 All.* 307 (*Muhammad Askari v. Radhe Ram Singh*).

(4) (1901) *I. L. R. 25 Bom.* 378 (386) (*Dick v. Dhunji Jiritha*).

(5) *37 P. R. 1902* (*Jag Lal v. Shib Lal*).

In the present suit it is clear that Mr. Livingstone and Mr. Dick jointly leased the house from the plaintiff and, in the absence of any agreement to the contrary, I must hold, in accordance with the authorities, that they are jointly and severally liable to pay the rent and that it was open to the plaintiff to sue one or both of them. No doubt under order I, rule 10, of the Civil Procedure Code, the Court had the power to order that the other tenant Mr. Dick should be made a co-defendant, but the Court was not bound to do this and, as there is no clue to Mr. Dick's whereabouts, it would not have been proper for it to insist that he should be made a party.

The application for revision is therefore rejected. No costs are allowed, no certificate having been filed.

Revision rejected.

CRIMINAL JUDGMENTS,
1914.



Chief Court of the Punjab.

CRIMINAL JUDGMENTS.

No. 1.

Before Hon. Mr. Justice Agnew.

FAZL AHMAD—(CONVICT)—APPELLANT

Versus

CROWN—RESPONDENT.

Criminal Appeal No 367 of 1913.

Indian Penal Code, sections 192 and 196—copy of a document not evidence—Indian Evidence Act, sections 65 and 74—meaning of “corruptly using evidence”—explanation consistent with the innocence of the accused.

Held, that in a criminal case the prosecution must exclude all explanation of the facts which is reasonably consistent with the innocence of the accused.

Held also, that there can be no fabrication of false evidence within the meaning of section 192, Indian Penal Code, if the evidence is not admissible in itself.

Empress v. Gauri Shankar (1), *Empress v. Zakir Husain* (2), and *Emperor v. Chandra Kumar Misser* (3), referred to.

Held also, that a letter by a village *Nikah Khwan* to the Moharrir in charge of the central office, in which entries in the village register are copied, informing him that he had been told that a woman whose marriage he had effected had not been divorced by her former husband, and asking that no action be taken on his report of the marriage is not a public document within the meaning of section 74 of the Evidence Act, and consequently under section 65 no secondary evidence of its contents is admissible in evidence.

Held also, that the production of a copy of that letter was an attempt to use the original.

Queen v. Nuzum Ali (4) and *Emperor v. Mulai Singh* (5), referred to.

Held further, that the production of the copy by the accused person with the intention of procuring a false conviction was a corrupt intention within the meaning of section 196 of the Indian Penal Code, and he was therefore rightly convicted under that section.

Criminal Revision 26 of 1909 (unpublished), *Empress v. Kherode Chunder* (6), *Queen v. Muddoo Soodunshaw* (7) and *Lakshmajee v. Empress* (8), referred to.

(1) (1883) *I. L. R.* 6 *All.* 42.

(2) (1898) *I. L. R.* 21 *All.* 159.

(3) (1905) 2 *Cal. L. J.* 46.

(4) (1866) 6 *W. R.* 41 (*Cr.*).

(5) (1906) *I. L. R.* 28 *All.* 402.

(6) (1880) *I. L. R.* 5 *Cal.* 717.

(7) (1867) 7 *W. R.* 23 (*Cr.*).

(8) (1884) *I. L. R.* 7 *Mad.* 289

*Appeal from the order of E. A. Estcourt, Esquire, Sessions Judge,
Attock Division, dated the 30th April 1913.*

Pestonji Dadabhai, for appellant.

B. Petman, for respondent.

The judgment of the learned Judge was as follows :—

15th July 1913.

AGNEW, J.—The charge against the appellant Fazl Ahmad purported to be under section 196, Indian Penal Code, and is worded as follows :—“ That you, on 2nd November 1912, at Campbellpur, in the Court of..... produced a fabricated document, exhibit P. C. 2, which exhibit is a false document in so far as it was not posted on 5th August 1908 as it purports to be and knowing the same P. C. 2 to be fabricated evidence, and thereby committed an offence punishable under section 196, Indian Penal Code.”

The facts are briefly, that Mussammat Mehr Bhari was married to Fazl Ahmad in 1905 and lived with him at *mauza* Mari till the year 1908. Fazl Ahmad contracted a second marriage and Mussammat Mehr Bhari went to *mauza* Dhok Sharfa where Fazl Ahmad's parents live and there on 29th July 1908, she was married to Ahmad, brother of Fazl Ahmad. The “ *Nikah* ” was performed by Abdullah Shah, now deceased, and an entry made in the Marriage Register. The entry states that she had been divorced three and a half months before by Fazl Ahmad, appellant. Ahmad died two or three months after this marriage and then Mehr Bhari is said, though the point is not clear, to have lived with her father, Sultan, till the year 1912.

On 31st May 1912, Fazl Ahmad instituted a suit for recovery of Rs. 114, the value of ornaments said to have been taken away by Mehr Bhari. The chief defendant was the girl's father, Sultan. The latter, on 28th July, produced a receipt from Fazal Ahmad, but the latter denied that he had received the money. On 12th November 1912, Sultan produced a copy of the Marriage Register entry referred to above, in order to shew that Mehr Bhari had been divorced by Fazl Ahmad previous to her marriage with Ahmad, his brother.

Before this, however, Fazl Ahmad had, on 26th September 1912, applied for a search warrant against Mussammat Mehr Bhari. She appeared in Court on 28th September and it appeared that on 27th September she had been married to one Gaman.

Then, on 5th October 1912, Fazl Ahmad lodged a complaint under section 44, Indian Penal Code (Bigamy), against Mussammat Mehr Bhari, Gaman, Sultan and another. On

2nd November 1912 he produced a copy, P. A., of the document P. C. 2, by way of proof that Mussammat Mehr Bhari had not been divorced by him. This document purports to be a letter or report, dated 5th August 1908, written by one Karam Ilahi, appellant in the connected case, on behalf of Abdullah Shah, the *Nikah Khwan*, who read the marriage between Ahmad and Mussammat Mehr Bhari on 29th July 1903. It is addressed to the *Moharrir* in charge of the Central Marriage Register in the Deputy Commissioner's Office at Cambellpur, into which entries from the village registers are copied and states that on the day after the Ahmad-Mehr Bhari marriage Fazl Ahmad had come to the writer and had complained that, he had never divorced Mussammat Mehr Bhari; the writer asks that the *Moharrir* at the *Sudder* shall take no action on the copy of the entry relating to the marriage already despatched.

It has been proved beyond doubt that the post office marks shewing receipt and delivery of Exhibit P. C. 2 are not those of 1908, but of 1912. The figures shewing the year—date are in these stamps removable and what has happened is that some person has got hold of the Post Office stamps of 1912 and inserted the removable figures '8 Au. 8' in a 1912 stamp so as to shew that P. C. 2 was *posted* in 1908. The object of Fazl Ahmad, appellant in the criminal proceedings against his wife, her father and Gaman, was to shew that he had never divorced Mussammat Mehr Bhari and, clearly, if it could be shewn that this protest said by Fazl Ahmad to have been made by him immediately after the marriage of Mussammat Mehr Bhari and his brother Ahmad, and embodied in P. C. 2, had been posted in August 1908, and had remained since then in the office of the Deputy Commissioner, the assertion of Fazl Ahmad that he had never divorced Mussammat Mehr Bhari would find strong confirmation.

The finding of the learned Sessions Judge, who concurred with the assessors, is that Fazl Ahmad did as a fact divorce his wife in 1903 previous to her marriage with Ahmad, his brother, that the document—Exhibit P. C. 2—is a forgery, and that Fazl Ahmad produced the copy P. A. in Court knowing that the original P. C. 2 was a fabricated document. He also finds on the evidence that Karam Ilahi, the writer of P. C. 2, wrote the document in 1912, with a view to proving that Fazl Ahmad had not divorced Mussammat Mehr Bhari in 1908 and so to establish the charge under section 494, Indian Penal Code, against Mussammat Mehr Bhari and Gaman.

The first point of fact for decision is, whether Fazl Ahmad did or did not divorce Mussammat Mehr Bhari ? The woman herself denies that there was any divorce. The entry in the Marriage Register of 27th July 1908 is, however, very strong evidence of the fact of divorce ; it is further, as found by the Judge and assessors, extremely unlikely that Fazl Ahmad's own father and mother would cause their elder son's wife to be married to their younger son unless there had been a divorce.

For the defence certain stamps are produced purchased in 1908 and a second set in 1912 which go to shew that it was intended in these years to execute a formal deed of divorce on Fazl Ahmad's part and on Mussammat Mehr Bhari's part to settle the question of dower. But these only shew necessarily that at the time the question of having a *written* deed of divorce was in the minds of the parties. They do not shew that no verbal divorce had taken place before. As regards Exhibit P. C. 2, had it been in the possession of the *Nikah Khwan* Abdullah Shah in 1908, it is almost inconceivable that he should not have brought the facts to the notice of his Inspecting Girdawar, Muhammad Yusaf, who verified this entry on 1st September 1908 and, if the document had, as Abdullah Shah says, been posted in 1908 and lain for four years in the Deputy Commissioner's Office, it is very difficult to think that no action would have been taken upon it by way of correcting the entry regarding the Ahmad-Mehr Bhari marriage in the central Register kept in the Deputy Commissioner's office. It is further shewn that the writer of P. C. 2, Karam Ilahi, has a relative, Dadu Khan, who sits in the room in which the *Moharrir Nikah Khwan* keeps his papers and that the cupboard is often left open. It would not be difficult, then, to slip in a paper, such as Exhibit P. C. 2, at any time. Again, the post office marks on the document are certainly not of the year of 1908, but of the year 1912 and a document of which some person desired to establish the authenticity by means of forged post office seals is clearly open to grave suspicion as regards the genuineness of its contents.

Lastly, Sultan, the father of Mussammat Mehr Bhari, got her married on 27th September 1912 to Gaman. It is hardly likely that he would have the boldness to expose himself and his daughter to a charge of bigamy when actually engaged in litigation with the husband, Fazl Ahmad. If the story of the latter is to be believed, both his own father and the father of Mehr Bhari have on two separate occasions promoted two separate bigamous marriages among their own children. Surely such a state of things is inconceivable.

I concur, then, with the learned Sessions Judge and the assessors that it is proved that Fazl Ahmad did divorce Mussammat Mehr Bhari.

The next finding of fact upon which a decision is necessary is that Karam Ilahi, appellant in the connected case, wrote the document, Exhibit P. C. 2 in 1912, with a view to establishing the charge under section 494, Indian Penal Code, against Gaman, Mussammat Mehr Bhari and Sultan.

Karam Ilahi's own account of the matter is that he wrote P. C. 2 for Abdullah Shah on 5th August 1908 and made the document over to the latter; he had nothing to do with the posting. He also points out that, if he had intended to forge a document like this, he would hardly have been so foolish as to sign his name thereto. The account given by the *Nikah Khwan* Abdullah Shah is that Karam Ilahi wrote P. C. 2 for him on 5th August 1908, and that he posted it in an envelope five or six days afterwards. That the document was posted in an envelope is obviously false, as a glance at the paper will shew. Abdullah Shah is dead, but he was alive on 2nd November 1912, and it must be remembered that, in regard to the alleged bigamous marriage between Ahmad and Mussammat Mehr Bhari, he was in the position of a man who was blamable for having read the *Nikah* between Ahmad and an undivorced woman. That at least was the allegation. It was to his interest to shew that he was innocent of knowledge that Mussammat Mehr Bhari had *not* been divorced and to shew that he took steps to bring his mistake to the notice of the authorities as soon as he learnt the facts. It is *possible*, then, that Abdullah Shah may have had this document by him since 5th August 1908 and may have posted it in 1912 possibly in connivance with Fazl Ahmad or Karam Ilahi or both, in order to save himself from blame. The prosecution must in a criminal case exclude all explanation of the facts which is reasonably consistent with the innocence of the accused and in this matter I must hold that it is *possible* that Exhibit P. C. 2 was really written in 1908 by Karam Ilahi and was kept by Abdullah Shah till 1912, when it was addressed and posted by some one who may not have been Karam Ilahi.

I hold it proved, then, that the person who affixed the post office seals to Exhibit P. C. 2 fabricated false evidence within the meaning of section 192, Indian Penal Code. Fazl Ahmad must have known the evidence to be fabricated since he knew that his wife had not been divorced and he was the

person who stood to gain if Exhibit P. C. 2 were accepted as a genuine document. Moreover, Fazl Ahmad admits that he knew that the document P. C. 2 had been sent a few days after it was written and yet, though in the Civil suit regarding the ornaments the defendant on 15th July 1912 set up the divorce as a defence, he did not apply for a copy of P. C. 2 till 25th October 1912. Taking all the facts into consideration it is, I think, a reasonable inference that Fazl Ahmad knew P. C. 2 to be a fabricated document.

The following questions remain for decision :—

(1). Whether Fazl Ahmad used or attempted to use Exhibit P. C. 2 as true or genuine ?

(2). Whether he did so “ corruptly ” ?

The appellant did not produce Exhibit P. C. 2 in original, but a copy thereof, Exhibit P. A. The weight of authority is in favour of the view that there can be no fabrication of false evidence within the meaning of section 192, Indian Penal Code, if the evidence is not admissible in itself—*Empress v. Gauri Shankar* (1), *Empress v. Zakir Husain* (2), *Emperor v. Chandra Kumar Misser* (3). The document, Exhibit P. C. 2, purports to be a report by a village *Nikah Khwan*, Abdullah Shah, to the *Moharrir* in charge of the Central Office in Campbellpur in which entries in the village registers are copied into another register, informing him that on the day after the entry of the marriage of Mussammat Mehr Bhari and Ahmad, Fazl Ahmad had come to the writer and stated that he had not divorced Mussammat Mehr Bhari; accordingly the writer desires the *Moharrir* not to take action upon his report of the marriage. I do not think that such a report was a public document within the meaning of section 74, Indian Evidence Act; and, if so, under section 65 no secondary evidence of its contents could be given and the Exhibit P. A. should not have been received in evidence by the Magistrate who tried the Bigamy case.

In the present case, however, the document, Exhibit P. C. 2, itself was proved by the evidence of Abdullah Shah and, though the latter is dead, his evidence is admissible as against Fazl Ahmad. The question therefore is, whether the production of the copy P. A. is such an ‘ use or attempt to use as true or genuine ’ as is contemplated by section 196. The rulings *Queen v. Nujum Ali* (4), and *Emperor v. Mulai Singh* (5), are authorities for

1, (1883) 1 L. R. 6 All. 42.

(2), (1895) 1 L. R. 21 All. 159.

(3) (1905) 2 Cal. L. J. 46.

(4) (1866) 6 W. R. 41.

(5) (1906) 1 L. R. 28 All. 402.

holding that the production of the copy was an attempt to use the original.

As regards the intention of the appellant the charge as framed does not include the word corruptly as denoting the appellant's intention, neither does the learned Sessions Judge discuss the question of intention. According to Morgan and Macpherson's Indian Penal Code, p. 164, the word corruptly is used in sections 196, 198, 200, 219 and 220, Indian Penal Code, to denote that those whose duty it is to submit evidence for the consideration of judicial and other functionaries on behalf of clients do not incur the penalties for using false evidence unless they use the evidence corruptly. In Criminal Revision No. 26 of 1909, *Bhim Singh v. Julian Singh*, it is said that the word is not used in the sense of 'dishonestly' or 'fraudulently.' See also *Empress v. Kherode Chander* (1). On the other hand, convictions have been had under this section where the word was not confined to the restricted sense indicated above—*Queen v. Moodoo Soodun Shaw* (2), and *Lakshmajee v. Empress* (3).

In the present case where the intention of the person who used the fabricated evidence was not technically 'dishonest' or 'fraudulent,' but rather wicked and immoral inasmuch as he desired to procure a false conviction, it is hard to see what word could be substituted for the word 'corruptly' as indicating a general felonious intent. I do not think that the word is intended to connote a motive necessarily connected with the passing of money as an inducement to the person impugned to use or attempt to use the fabricated evidence, and I hold that an intention to procure a false conviction is a corrupt intention.

I find, then, after careful review of the evidence, that the facts constituting the act imputed to the appellant in the charge upon which he was tried under section 196 have been proved, and that the act was done corruptly within the meaning of the section.

The sentence is not too severe. I accordingly dismiss the appeal. As the appellant is not present he must surrender to his bail before the District Magistrate to whom orders will be issued. Counsel informed.

Appeal dismissed.

(1) (1830) *I. L. R.* 5 *Cal.* 717.

(2) (1867) 7 *W. R.* 23 (*Cr.*).

(3) (1834) *I. L. R.* 7 *Mad.* 289.

No. 2.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice
Cheris.*

CROWN—APPELLANT

Versus

SHIBBAN—RESPONDENT.

Criminal Appeal No. 556 of 1913.

Excise Act, XII of 1896, sections 44 and 57—whether Police officer notified under section 44 is an excise officer for purpose of section 57.

Held, that under notifications of the Local Government, made under section 44 of the Excise Act, 1896, a Sub-Inspector of Police is an excise officer for all purposes connected with the excise powers conferred on excise officers by sections 36, 37 and 38, and that consequently such an officer must be deemed to be also an excise officer for the purpose of section 57 of the Act.

22 P. R. (Cr.) 1900 (*Empress v. Chet Singh*) (1), 8 P. R. (Cr.) 1901 (*Empress v. Sundar Singh*) (2), *Empress v. Makunda* (3) and *Emperor v. Lachmi Narain* (4), followed.

13 P. R. (Cr.) 1910 (*Crown v. Niadar Singh*) (5) and 9 P. R. (Cr.) 1897 (*Pirag v. Empress*) (6), distinguished.

Appeal from the order of Khan Bahadur Ghulam Muhammad Hassan Khan, Magistrate, 2nd Class, Delhi, dated the 15th May 1913.

Government Advocate, for appellant.

Iftikhar Ali, for respondent.

The judgment of the Court was delivered by—

30th Oct. 1913.

RATTIGAN, J.—This is an appeal by the Local Government under section 417, Criminal Procedure Code, from the order of the Magistrate, second class, Delhi, acquitting the respondent of the offence under section 48 of the Excise Act, 1896, with which he was charged.

The Magistrate was apparently satisfied that the respondent was actually in possession of cocaine contrary to the provisions of section 48 of the Act, but he acquitted him on the ground that under section 57 the Court could not take cognizance of the offence, except on the complaint or report of the Collector or an Excise Officer.

(1) 22 P. R. (Cr.) 1900.
(2) 8 P. R. (Cr.) 1901.
(3) (1897) I. L. R. 20 All. 70.

(4) (1908) I. L. R. 30 All. 377.
(5) 13 P. R. (Cr.) 1910.
(6) 9 P. R. (Cr.) 1897.

It appears that the respondent was arrested by a Sub-Inspector of Police and was taken in accordance with the provision of section 41 of the Act to the Magistrate for trial. Under the notifications of the Local Government made under section 44 of the Act the Sub-Inspector was an Excise Officer for all purposes connected with the excise powers conferred on Excise Officers by sections 36, 37 and 38 of the Act. Under section 37 the Sub-Inspector had power to arrest any person having in his possession any article liable to confiscation under the Act and under section 41 he was bound within 24 hours after such arrest to make a full report of all the particulars to his official superior and to take the person arrested with all convenient despatch to a Magistrate for trial. It has been held in a series of cases that under these circumstances a Police officer, invested with powers of an Excise Officer under section 44, is to be deemed an Excise Officer for the purpose of section 57 (see No. 22 *P. R. (Cr.)* 1900 (*Empress v. Chet Singh*) (1), 8 *P. R. (Cr.)* 1901 (*Empress v. Sundar Singh*) (2), *Empress v. Makunda* (3) and *Emperor v. Lachmi Narain* (4).

The learned pleader for the respondent relies on No. 13 *P. R. (Cr.)* 1910 (*Crown v. Niadar Singh*) (5) and No. 9 *P. R. (Cr.)* 1897 (*Pirag v. Empress*) (6), and argues that Police Officers, who are invested with powers under section 44, have merely the power of arrest of offenders and seizure of property conferred on Excise Officers by sections 36, 37 and 38.

The authorities cited by him do not support this contention. In those cases it was held that the Court could not take cognisance of an offence in respect of which Police Officers, invested under section 44, had no power to act under sections 36, 37 or 38, and that consequently a complaint or report of a Collector or an Excise Officer was an essential condition precedent to the Court taking cognisance of such an offence.

The authorities cited by the learned Government Advocate are directly in point, and following them, we must accept this appeal and set aside the order of acquittal. We direct that the record be returned to the Magistrate in order that he may dispose of the case upon the merits.

Appeal accepted.

(1) 22 *P. R. (Cr.)* 1900.

(2) 8 *P. R. (Cr.)* 1901.

(3) (1897) *I. L. R.* 20 *All.* 70.

(4) (1908) *I. L. R.* 30 *All.* 377.

(5) 13 *P. R. (Cr.)* 1910.

(6) 9 *P. R. (Cr.)* 1897.

No. 3.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Chevis.

MULA MAL—(ACCUSED)—PETITIONER

Versus

CHURANJI LAL—(COMPLAINANT)—RESPONDENT.

Criminal Revision No. 928 of 1913.

Criminal Procedure Code, Act V of 1898, section 195—sanction for prosecution in respect of offences committed before an arbitrator.

Held, that sanction under section 195, Code of Criminal Procedure, is required before a Court can take cognisance of a complaint in respect of offences under sections 193 and 471, Indian Penal Code, alleged to have been committed in the proceedings before an arbitrator appointed in a civil suit.

Puttiah Chetty v. Veerasamy (1) and Saadat Ali Khan v. Emperor (2), referred to.

Petition for revision of the order of W. deM. Malan, Esquire, District Magistrate, Jullundur, dated the 19th April 1913.

Lahbu Ram for petitioner.

Sunder Das for respondent.

The judgment of the Court was delivered by—

20th Oct. 1913.

CHEVIS, J.—This judgment will cover the connected case, Criminal Revision 929 of 1913.

The facts are that there was a civil suit between Mula Mal and Churanji Lal, which was decided after reference to arbitration. Churanji Lal then lodged a complaint, charging Mula Mal with offences under sections 193 and 471, Indian Penal Code, alleged to have been committed in the proceedings before the arbitrator. The objection raised on behalf of Mula Mal was that such charges required the sanction of Court according to section 195 of the Criminal Procedure Code. These objections were overruled by the learned Magistrate, who held that no sanction was required. Mula Mal applies for revision.

There is a clear authority to the effect that sanction is required in such cases, *viz.*, *Puttiah Chetty v. Veerasamy Mulaly (1)*. The learned Magistrate has distinguished this case on the ground that in this case the documents produced before the arbitrator were attached to the file and became a part of the Court's file of the case. But the Civil Procedure Code, *vide* 2nd schedule, para. 10, requires all depositions and documents

(1) (1907) 17 *Mad. L. J.* 420.

(2) (1907) 6 *Cr. L. J.* 160.

taken and proved before an arbitrator to be filed in Court when an award has been made; so the arbitrator's record finally becomes a part of the Court's record. We fail, therefore, to see any distinction between this case and the Madras case.

The learned Magistrate quotes *Saadat Ali Khan v. Emperor* (1), but we fail to see how this case supports the view that no sanction is needed. There the offence was committed before a Commissioner, who happened to be a Magistrate. The High Court held, not that no sanction was required, but that the Court whose sanction was required was that of the Court in which the case was pending, and not that of the Magistrate who had been appointed the Commissioner to take evidence on commission. This case seems to us to tell in favour of the view that sanction is requisite in such cases.

We have no hesitation in following the Madras ruling. We hold that sanction is necessary, and we accept this application and set aside the proceedings of the Magistrate and dismiss the complaint for want of sanction.

Revision accepted.

No. 4.

*Before Hon. Mr. Justice Johnstone and
Hon. Mr. Justice Shah Din.*

MOHAN MALIK—(CONVICT)—PETITIONER

Versus

CROWN—RESPONDENT.

Criminal Revision No. 457 of 1913.

Indian Railways Act, IX of 1890, sections 47 and 122—trespass on railway line—punishable under latter section—meaning of “unlawfully.”

Held, that a person may be guilty of unlawfully entering upon a railway within the meaning of section 122 of the Railways Act, notwithstanding that no rule has been framed under section 47 (1) (g) making such an act an offence.

Criminal Revision 56 of 1893 (unpublished), dissented from.

Held also, that no rule properly made under clause (g), sub-section (1) of section 47 would have reference to a trespass by a member of the general public upon a railway line, as contemplated by section 122.

Held further, that the word “unlawfully” as used in section 122 means “without the leave of the Railway administration.”

I. L. R. 30 Bom. 348 (2), approved.

(1) (1907) 6 Cr. L. J. 160 (*Saadat Ali Khan v. Emperor*).

(2) (1905) *I. L. R. 30 Bom. 348* (*Emperor v. Hussein Noor Mahomed*).

Petition for revision of the order of S. Wilberforce, Esquire, Sessions Judge, Multan Division, dated the 21st January 1913.

Devi Dial, for petitioner.

Balwant Rai, for respondent.

The judgment of the Court was delivered by—

1st Nov. 1913.

SHAH DIN, J.—The following extract from the judgment of the Magistrate gives the facts of this case :—

“The accused Mohan Malik is a broker who works as such at Multan City Railway Station. His work is mainly in the goods shed where loading and unloading takes place, but he has sometimes to go to the other side of the station, where the station buildings are, in order to have sanction and signature of the station master in important matters. There is a direction-board standing in the middle of the goods side platform, on which it is noted down in English, as well as in the vernacular, that crossing the lines is prohibited, and that trespassers will be prosecuted. On 8th July 1911 at about 11-30 a.m., the accused saw the station master in his room in the station buildings and then crossed the lines for going on to the goods shed side of the Punjab section. He crossed several lines on one of which, at that very time, an engine was standing, but the accused, whether through inadvertence or boldness, crossed that line also and was about to be run down when he was startled by the voice of Babu Rup Chand, goods clerk, who was standing on the platform and witnessing the scene. Babu Wasu Ram, Shah-ud-din, Jamadar, and Tola, Jamadar, were also there, and they all saw this. Mohan has thus been prosecuted under section 122, Railways Act, IX of 1890.”

The Magistrate convicted the petitioner under section 122 of the Railways Act, holding that his action in crossing the lines of rail on the occasion in question was unlawful within the meaning of the said section ; and the petitioner was sentenced to pay a fine of Rs. 10. On appeal the learned Sessions Judge has upheld both the conviction and the sentence.

On behalf of the petitioner it has been argued before us that since no by-law has been framed under section 47 (g) of the Railways Act making it an offence to cross the lines of rail without the permission of the Railway authorities, the petitioner's entry on the railway lines, in respect of which he has been convicted under section 122 of the Railways Act was not unlawful, and that his conviction is, therefore, bad in law.

In support of this contention the petitioner's counsel has cited an unpublished ruling of Mr. Justice Roe in the case of *Ram Narain and others v. The Empress* (Criminal Revision No. 56 of 1893, decided on the 14th February 1893).

We have heard the point argued on both sides, and we have come to the conclusion that the petitioner has been rightly convicted under section 122 of the Railways Act, his entry on the railway lines on the occasion in question being unlawful within the meaning of that section. With all deference to the learned Judge who decided the criminal revision above referred to we are of opinion that section 47 of the Railways Act has no bearing on the point before us and that no by-law properly made under clause (g) of sub-section (1) of the said section would have reference to a trespass by a member of the general public upon railway lines as contemplated by section 122 of the Act. This section occurs in Chapter IX of the Act which relates to penalties and offences, and it creates a specific offence cognizable by a Criminal Court and has, therefore, no connection whatever with section 47 of the Act.

As held in *I. L. R. 30 Bom. 348* (1); the word "unlawful" as used in section 122 means, without the leave of the Railway administration; and the petitioner was clearly guilty of the offence specified in the first part of the section if he entered upon the railway lines on the occasion in question without obtaining such leave. Diwan Bhag Chand, Station Master, Multan City Station, says that there is a notice board at the side of the goods shed in English, Urdu and Hindi forbidding people to pass over the lines, and the petitioner has not attempted to prove that he had the permission of the Railway administration to cross the railway lines in order to go over to the goods shed after transacting business with the station master. His defence, that he has been crossing the lines under similar circumstances for a good many years past, and that other people also do the same, is obviously not sufficient to establish his innocence as regards the charge under section 122 of the Act.

We, therefore, agree with the Courts below in holding that the guilt of the petitioner under section 122 has been established, and we maintain his conviction and sentence and dismiss the revision.

Revision dismissed.

No. 5.

Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Chevis.

CROWN—COMPLAINANT

Versus

AHMAD BAKHSH—RESPONDENT.

Criminal Miscellaneous No. 97 of 1913.

Criminal Procedure Code, section 526—transfer of proceedings under section 110 of the Code.

Held that section 526 of the Criminal Procedure Code, does not empower a High Court to pass an order for transfer of proceedings under section 110 of the Code.

I. L. R. 15 All. 365 (1), 4 P. R. (Cr.) 1896 (2), 42 P. R. (Cr.) 1905 (3), 6 P. R. (Cr.) 1911 (F. B.) (4), I. L. R. 25 Bom. 179 (5), I. L. R. 28 Cal. 709 (6), 13 P. R. (Cr.) 1885 (7), I. L. R. 16 Cal. 781 (p. 787) (8), approved.

I. L. R. 26 Mad. 188 (9), 2 Cal. L. J. R. 614 (10), and I. L. R. 34 All. 533 (11), dissented from.

1 P. R. (Cr.) 1913 (12), distinguished.

Application, under section 526 of the Code of Criminal Procedure for transfer of the proceedings under section 110 of the Code.

Dhanpat Rai, for petitioner.

Government Advocate, for respondent.

The judgment of the Court was delivered by—

25th Oct. 1913.

RATTIGAN, J.—The question referred to this Bench is whether it is competent to the Chief Court, under the provisions of section 526, Criminal Procedure Code, to transfer from the Court of one Magistrate to the Court of another Magistrate proceedings under section 110 of the Code. This question was considered somewhat elaborately in an order of the single Bench in Criminal Miscellaneous case No. 28 of 1913, (13), and in that order the authorities, *pro et con*, are all set forth. The

(1) (1893) *I. L. R. 15 All. 365 (Queen-Empress v. Lakhpat).*

(2) *4 P. R. (Cr.) 1896 (Natha Singh v. Pata Singh).*

(3) *42 P. R. (Cr.) 1905 (Muhammad Khan v. Emperor).*

(4) *6 P. R. (Cr.) 1911 (F. B.) (Narain Das v. Mussamat Durga Devi).*

(5) (1900) *I. L. R. 25 Bom. 179 (In re Pandurang Govind Pujari).*

(6) (1901) *I. L. R. 28 Cal. 709 (Lalit Mohan v. Surja Kanta Acharjee).*

(7) *13 P. R. (Cr.) 1885 (Hildephonsus v. Malone).*

(8) (1889) *I. L. R. 16 Cal. 781 (p. 787) (Nur Mohamed v. Bismulla Jan).*

(9) (1902) *I. L. R. 26 Mad. 188 (Arumuga Tegundan).*

(10) (1905) *2 Cal. L. J. R. 614 (Gurudas Nag v. Gaganendra Nath).*

(11) (1912) *I. L. R. 31 All. 533 (Jaggu Ahir v. Murli Shukul).*

(12) *1 P. R. (Cr.) 1913 (Bagga Mal v. Emperor).*

(13) *Printed at the end of this judgment, p. 16 infra.*

point was not, however, decided, but was referred, as in this case, to a Division Bench for determination. That reference was infructuous, as the Magistrate before whom the proceedings were pending at the time of the order, was subsequently transferred to another district, and as a result, the application for transfer failed upon the merits. We have, however, carefully read and considered the order of reference in that case, and after hearing Mr. Dhanpat Rai, who contended that this Court has jurisdiction to transfer proceedings under section 110 of the Code, we are of opinion that this power does not exist.

It is unnecessary for us to travel over the ground covered by the order of reference to which we have referred, and we need say no more than that we agree, for the reasons set forth therein and in the judgment of the High Court of Bombay in *I. L. R. 25 Bom. 179*(1), and of Taylor J. in *I. L. R. 28 Cal. 709*(2), that section 526 of the Code does not empower a High Court to pass an order under that section transferring proceedings under section 110. Such proceedings do not amount to an inquiry into or trial of any "offence" *I. L. R. 15 All. 365* (3), 4 *P. R. 1896* (*Cr.*) (4), the person from whom security is demanded is not "an accused person" (6 *P. R. 1911 Cr. F. B.*) (5) and in no sense can "the case" against such person be reasonably described "as a criminal case".

In a very brief judgment the learned Judges of the Madras High Court in *I. L. R. 26 Mad. 188* (6) remarked that if proceedings under section 145 of the Code were not a criminal case, it was difficult to conceive what they amounted to. The difficulty does not strike us as insuperable, as such proceedings may well be "a case" and yet not "a criminal case." As pointed out by Taylor J. in the Calcutta case above cited, the Legislature in 1874 deliberately made a distinction between "cases" and "criminal cases", and a Court of Justice is not entitled to ignore the distinction so made and treat it as of no material importance, especially as the distinction is still observed in various sections of the present Code (*cf., e.g.,* sections 526 and 527 with section 528).

We therefore hold that this Court is not empowered under section 526 to direct the transfer of proceedings under section 110. In so holding we do not, of course,

(1) (1900) *I. L. R. 25 Bom. 179* (In re Pandurang Govind Pujari).

(2) (1901) *I. L. R. 28 Cal. 709* (Lalit Mohan v. Surja Kanta Acharjee).

(3) (1893) *I. L. R. 15 All. 365* (Queen-Empress v. Lakhpat).

(4) 4 *P. R. (Cr.) 1896* (Natha Singh v. Pala Singh).

(5) 6 *P. R. (Cr.) 1911* (F. B.) (Narain Das v. Mussammat Durga Devi).

(6) (1902) *I. L. R. 26 Mad. 188* (Arumuga Tegundan).

imply, that it is not open to this Court to take action under section 439 of the Code and to revise orders passed by Magistrates in cases where persons are called upon to furnish security for good behaviour. Section 439 expressly empowers a High Court in the case of any proceeding which comes before it to exercise (*inter alia*) any of the powers conferred on a Court of appeal by section 423, and clause (c) of the latter section provides that a Court of appeal may, "in an appeal from any other order, alter or reverse such order." As we read section 439, the meaning of its provisions is that in any case, where the High Court interferes on the revision side, it has the same powers in dealing with orders as would be possessed by an Appellate Court if such orders were open to appeal. This question is not now before us and we refer to it merely incidentally in order to preclude the inference that in holding that proceedings under section 110 are not "a criminal case" for the purposes of section 527, we must be taken to decide that the High Court has no jurisdiction to revise orders passed under section 118.

Mr. Dhanpat Rai's final argument was that in any event the Chief Court has jurisdiction to transfer proceedings under section 110 of the Code, in virtue of the general powers of superintendence and supervision conferred upon it by section 33 of the Punjab Courts Act. As regards this argument it is unnecessary for us to say more than that the general power thereby conferred upon the Chief Court relates to the administrative control which it exercises over Subordinate Courts and cannot be interpreted as enlarging the powers which are specifically granted to it, for a particular purpose, by the provisions of section 526 of the Code of Criminal Procedure.

Our answer, therefore, to the reference is that the Chief Court has no jurisdiction to transfer proceedings under section 110 of the Criminal Procedure Code from the Court of one Magistrate to the Court of another Magistrate.

The record will now be returned to the single Bench for disposal of the application.

The order of the Hon. Mr. Justice Rattigan referred to in the above order :—

19th June 1913.

RATTIGAN, J.—This is a petition under section 526, Criminal Procedure Code, for the transfer of proceedings, under section 110 of the Code which are pending before a certain Magistrate of the 1st class, and the first question that arises is whether this Court has jurisdiction to entertain such a petition.

The orders which a High Court is empowered to pass under section 526 are as follows :—

- “ (i) that any offence be enquired into or tried by any
“ Court not empowered under sections 177 to
“ 184 (both inclusive), but in other respects
“ competent to enquire into or try such offence ” ;
- “ (ii) that any particular criminal case or appeal or
“ class of such cases or appeals be transferred
“ from a Criminal Court subordinate to its
“ authority to any other such Criminal Court
“ of equal or superior jurisdiction ;
- “ (iii) that any particular criminal case or appeal be
“ transferred to and tried before itself ; or
- “ (iv) that an accused person be committed for trial to
“ itself or to a Court of Session ”

The *second* sub-section is not relevant for the purposes of the question before me, but the other sub-sections have to be considered and run as follows :—

“ (3). The High Court may act either on the report of
“ the lower Court, or on the application of a party interested,
“ or on its own initiative.

“ (4). Every application for the exercise of the power
“ conferred by this section shall be made by motion which shall,
“ except when the applicant is the Advocate-General, be
“ supported by affidavit or affirmation.

“ (5). When an accused person makes an application
“ under this section the High Court may direct him to execute
“ a bond with or without sureties, conditioned that he will, if
“ convicted, pay the costs of the prosecutor.”

“ (6). Every accused person making any such application
“ shall give to the Public Prosecutor notice in writing of the
“ application, together with a copy of the grounds on which it
“ is made ; and no order shall be made on the merits of the
“ application unless at least twenty-four hours have elapsed
“ between the giving of such notice and the hearing of the
“ application.

“ (7). Nothing in this section shall be deemed to affect
“ any order made under section 197.

“ (8). If, in any criminal case or appeal before the
“ commencement of the hearing, the Public Prosecutor, the

“complainant or the accused notifies to the Court before which the case or appeal is pending, his intention to make an application under this section in respect of the case, the Court shall exercise the powers of postponement or adjournment given by section 344 in such a manner as will afford a reasonable time for the application being made and an order being obtained thereon, before the accused is called on for his defence, or, in the case of an appeal, before the hearing of the appeal.”

Obviously, in the present case sub-clause (i) of sub-section (1) has no applicability, for a Magistrate taking action under section 110 is not enquiring into an *offence* that has been committed; he is acting for the purpose of *preventing* the commission of offences of the kind specified, and the imputation of a criminal habit is not a charge of an offence (per Tyrrell, J. in *I. L. R. XV All. 365* (1), approved and followed by Chatterji, J. in *4 P. R. 1896 (Cr.)* (2).

Equally clearly, sub-clause (iv) of the said section does not apply, as it has now been definitely settled by a Full Bench of this Court, approving *42 P. R. 1905 (Cr.)* (3), that a person from whom security has been demanded under section 107 is not “an accused person” (*6 P. R. 1911 (Cr.)* (4)). It appears to me that, by parity of reasoning, a person from whom security is demanded under section 110 must also necessarily be held not to be “an accused person,” for, as observed in *42 P. R. 1905 (Cr.)* (3), it can hardly be seriously argued that “a person summoned under Chapter VIII ‘is ‘accused of any offence,’ and it has been repeatedly held “that he is not”

Does then sub-clause (ii) of sub-section (1) give jurisdiction to the High Court? Or, in other words, is a proceeding under section 110 “a criminal case”?

Certain authorities have been cited before me to the effect that a proceeding under section 145 of the Code (which finds a place in Chapter XII) is “a criminal case” within the meaning

(1) (1893) *I. L. R. 15 All. 365 (Queen-Empress v. Lakhpat)*.

(2) *4 P. R. (Cr.) 1896 (Natha Singh v. Pala Singh)*.

(3) *42 P. R. (Cr.) 1905 (Muhammad Khan v. Emperor)*.

(4) *6 P. R. (Cr.) 1911 (Narain Das v. Mussammat Durgi Devi)*.

and for the purposes of section 526, *I. L. R.* 26 *Mad.* 188 (1), 2 *Cal. L. J. R.* 614 (2) and *I. L. R.* 34 *All.* 533 (3). On the other hand, the Bombay High Court holds a different opinion *I. L. R.* 25 *Bom.* 179 (4) and in *I. L. R.* 28 *Cal.* 709 (5), Ghose and Taylor, J.J. give cogent reasons for holding that the expression 'criminal case,' as used in section 526 means something different from the expression 'a case,' as used in sections 192 and 528 of the Code. I entirely agree with these learned Judges that the Courts cannot ignore the action of the legislature in retaining the expression "*criminal case*" in section 526, while extending the scope of sections 192 and 528 by eliminating therefrom the word "*criminal*" before the word "*case*." As remarked by Taylor, J. (*I. L. R.* 28 *Cal.* 719) (5) "Looking at the history of the present Code of "Criminal Procedure it is clear that in 1874 by Act XI of that year a distinction was made by the legislature between "cases" and 'criminal cases.' In certain sections, but not in all, the wording was altered from the latter to the former, the word 'criminal' being in those instances omitted.

"Having regard to this fact, and to the further fact that "the distinction has been continued and extended (see sections "178, 192, 526, 556, where the wording is 'case' and sections "526, 527, where the wording is 'criminal case'), I am of "opinion that the two phrases are not in the Code of Criminal "Procedure co-extensive and that the phrases are not used "indiscriminately or interchangeably. And, further, it appears "to me that the phrase 'criminal case' is intended to be used "in a limited sense and not to apply to every case cognizable "by a Criminal Court. For this reason, and also in consideration of the provisions of section 435 (3) of the Code of "Criminal Procedure I would doubt the existence of a power "under section 526 of the Code of Criminal Procedure to "transfer cases, which do not relate to matters, which may "strictly be described as 'criminal,' as relating to a crime or "offence under the law."

In my opinion, no case can be rightly described as a criminal case unless the person against whom proceedings are taken is accused of an offence. It is true that in section 488 (7) of the Code, a person against whom proceedings are taken for the maintenance of his wife or child, is referred to as an

(1) (1902) *I. L. R.* 26 *Mad.* 188 (*Arumuga Tegundan*).

(2) (1905) 2 *Cal. L. J. R.* 614 (*Gurudas Nag v. Gaganendra Nath*).

(3) (1912) *I. L. R.* 34 *All.* 533 (*Jaggu Ahir v. Murli Shukul*).

(4) (1900) *I. L. R.* 25 *Bom.* 179 *In re Pandurang Govind Pujari*.

(5) (1901) *I. L. R.* 28 *Cal.* 709 (*Lolit Mohan v. Surja Kanta Acharjee*).

'accused person,' and that an application for maintenance is not a complaint of an offence, 13 *P. R.* 1885 (*Cr.*) (1) and proceedings under section 488 are like bastardy proceedings in England, of the nature of civil proceeding. (See *I. L. R.* 16 *Cal.* 781 (2)). But though described as 'an accused person,' the person who is respondent in proceedings under section 488 is clearly not an accused person in the ordinary acceptation of the term. The very same sub-section provides that he "may tender himself as a witness and in such case shall be examined as such," the ordinary rule, of course, being that no accused person can be examined as a witness. But whether or not a proceeding under section 488, which, though cognizable by a Criminal Court, is in its very nature a civil proceeding, can yet be held to be 'a criminal case' simply and solely because the person against whom it is brought is referred to in sub-sections (7) and (9) as 'an accused person,' I am of opinion that a proceeding under section 110 is not a "criminal case" inasmuch as a criminal case is not the same as a case cognizable by a Criminal Court, and that in every criminal case there must be a person charged with the commission of an offence, whereas the person against whom such proceedings are taken is not an accused person in that sense.

I would, therefore, hold, as at present advised, that this Court has no power under section 526 of the Code to entertain the present petition and I have not been referred to any other provision of law which would give me jurisdiction to direct the transfer prayed for. I would only add in conclusion that in No. 1 *P. R.* 1913 (*Cr.*) (3) (decided by a single Bench) the present question was not raised and the judgment proceeds upon the assumption that section 526 is applicable to proceedings under section 110, the very point at issue before me. The question involved is, however, one of importance and difficulty, and I accordingly refer it to a Division Bench. Upon the merits, if it be held that this Court has jurisdiction. I am satisfied that a transfer should be directed, as the Magistrate before whom the proceedings are being held, in another case expressed himself in rather strong language against the petitioners and the other persons who have been summoned to show cause why security should not be demanded from them.

(1) 13 *P. R.* (*Cr.*) 1885 (*Hildephonsus v. Malone*).

(2) (1889) *I. L. R.* 16 *Cal.* 781 (*Nur Mahomed v. Bismulla Jan.*).

(3) 1 *P. R.* (*Cr.*) 1913 (*Bagga Mal v. Emperor*).

No. 6.

Before Hon. Mr. Justice Johnstone.

MAHALA—(CONVICT)—PETITIONER

Versus

CROWN—RESPONDENT.

Criminal Revision No. 1274 of 1913.

Criminal Procedure Code, Act V of 1898, sections 110, 122, 123 — security for good behaviour—grounds for refusing sureties offered—reference to Sessions Court.

The Petitioner was ordered by a Magistrate of the 1st class to give a bond, under section 110, Criminal Procedure Code, to be of good behaviour for three years, for Rs. 1,000 with four respectable witnesses—Petitioner offered as sureties four persons—who were admittedly financially fit to be sureties for Rs. 1,000 but these were rejected by the Magistrate, two as being relations, one as being a boy, and the last as being a bad character.

Held, that the order for security should have given particulars as to whether each and all of the sureties was to be held liable for Rs. 1,000 on occasion arising or Rs. 1,000 between them, so as to prevent misunderstanding later.

Held also, that mere relationship is no reason for refusing a surety. on the contrary it is ordinarily a recommendation. 11/✓

I. L. R. 25 All. 131 (1), approved.

Held also, that the Magistrate should have himself made inquiries before rejecting a surety as unfit, and should not have delegated such inquiry to any one else.

18 P. R. (Cr.) 1906 (2), referred to.

Held also, that the object of the law as to security for good behaviour is not to fill the jails with bad characters, but to bring reasonable pressure to bear on such persons to respect the law, and that two sureties would have been sufficient in the present case.

28 P. R. (Cr.) 1901 (3), referred to.

Held further, that as the order for security specified a term exceeding one year the Magistrate in ordering detention should have referred the case to the Sessions Court under section 123 (2) Criminal Procedure Code, even though he ordered imprisonment for one year only.

Held also, that the District Magistrate, when the case came before him, was not justified in dismissing the petition of the aggrieved party, that petition being explicit enough, merely because it did not contain exactly the details he wished to ascertain.

Petition for revision of the order of C. F. Strickland, Esquire, Magistrate, 1st class, Sargodha, District Shahpur, dated the 5th March 1913.

Nemo, for petitioner.

Nemo, for respondent.

(1) (1902) *I. L. R. 25 All. 131* (*Emperor v. Shib Singh*).

(2) *18 P. R. (Cr.) 1906* (*Emperor v. Kaim Khan*).

(3) *28 P. R. (Cr.) 1901* (*Wasaya v. Emperor*).

The judgment of the learned Judge was as follows :—

21st Nov. 1913.

JOHNSTONE, J.—No one has appeared, but nevertheless in my opinion the case is one that should not be dismissed for default. The order of the Magistrate was that petitioner should give a bond under section 110, Criminal Procedure Code, to be of good behaviour for 3 years, for Rs. 1,000 with respectable sureties. He does not say whether each and all are liable for Rs. 1,000 on occasion arising or Rs. 1,000 between them. Particulars like this should always be stated so as to prevent misunderstandings later. In his preliminary order the Magistrate included the condition that the sureties should be residents of places so near to accused that they could control him ; but this is not to be found in the final order.

Petitioner offered as sureties two descendants of his own great grand-father (Husain and Qaim), one Dara and one Bagri. The last named is rejected as being a boy, the first two as relatives and Dara as a bad character himself. Financially it is admitted that each of these persons is fit to be surety for Rs. 1,000.

Now I would like to point out that mere relationship is no reason for refusing a surety. A very little reflection will shew that a relation is more likely than any other person to have influence over a man and to be able to keep an eye on him ; in short, relationship is a recommendation. In this view I am supported by *I. L. R. 25 All. 131 (1)*. Therefore Husain and Qaim should have been accepted. As regards Bagri, who is said to be a boy and so to be ineligible, and as to Dara, said to have been twice convicted, I can find on the record no proof of the alleged facts. It is true that the Sub-Inspector of Police who *chalaned* the case reported that Dara had two convictions against him ; but in *18 P. R. 1906 (Cr.) (2)*, it was laid down that a Magistrate should enquire into such matters himself and not delegate such an enquiry to any one. In the present case such delegation was peculiarly objectionable, for the Sub-Inspector, who reported as to Dara, was the same who *chalaned* the case. Dara was never asked if he admitted his previous convictions, nor was petitioner allowed any say in the matter. I am further unable to find any verification of the assertion that Bagri is a " boy."

(1) (1902) *I. L. R. 25 All. 131* (*Emperor v. Shib Singh*).

(2) *18 P. R. (Cr.) 1906* (*Emperor v. Kaim Khan*).

It has frequently been pointed out by authority that the object of the law as to security for good behaviour is not to fill the jails with bad characters, but to bring reasonable pressure to bear on such persons to respect the law. In my opinion it is not reasonable in the present case to insist upon four sureties at all. Two sureties are ample in such a sum as Rs. 1,000, *i.e.*, Rs. 500 each. The Magistrate should for future guidance carefully study the law and such rulings as those noted above to which may be added 28 P. R. 1901 (Cr.) (1), and the rulings relied on in these cases.

So much for the Magistrate, 1st class. The District Magistrate when the case came before him took up an attitude, it is impossible to commend. The petition to him was quite explicit enough; and it was extremely hard on his part, merely because it did not contain just the particulars he wanted, to dismiss it summarily. He was bound by law to examine the facts and see whether the order of the Magistrate, 1st class, required amendment; and the pleaders who appeared for the petitioner could have answered any questions.

In conclusion, I must point out another grave irregularity that has been committed. Under section 123 (2), Criminal Procedure Code, inasmuch as the order for security specifies a term exceeding one year during which accused is to be of good behaviour, the Magistrate, in ordering detention of the accused, should have referred the case to the Sessions Court. No doubt the Magistrate ordered imprisonment for one year only after the failure of the accused to furnish adequate security; but this does not affect the question, and probably the reduction to one year at that stage was illegal.

In a case dealt with as this one has been, the only satisfactory course for this Court is to set aside the whole of the proceedings, including the orders of both the Courts below and to order retrial. It is hoped that on retrial the irregularities noted above will be avoided and the demand for security be reduced to reasonable dimensions.

I allow the revision and set aside the proceedings and orders of both Courts and order retrials.

Revision allowed.

No. 7.

Before Hon. Mr. Justice Johnstone.

RAM LAL (CONVICT)—APPELLANT

Versus

CROWN—RESPONDENT.

Criminal Revision No. 887 of 1913.

Foreign Jurisdiction—offence committed at Bhatinda Railway Station, in the Native State of Patiala—tribe by which Court—India (Foreign Jurisdiction) order in Council 1902 and Notifications Nos. 515 I. B. and 516 I. B. of 17th March 1913—Criminal Procedure Code, Act V of 1898, section 177.

Held, that under Government of India Notification No. 515 I. B. of 17th March 1913, the Courts of the Hissar District and those of Ferozepur have concurrent jurisdiction in the matter of offences committed at the Bhatinda Railway station.

Held also, that in future such jurisdiction should only be exercised by the Ferozepur Courts and not the Hissar Courts.

Held further, that under the combined effect of the two notifications Nos. 515 and 516 I. B. the appeal in the present case against the order of the Magistrate of Ferozepur lay to the Political Agent for the Phulkian States and Bhawalpur.

Reference by A. W. J. Talbot, Esquire, Sessions Judge, dated 25th April 1913.

Nemo, for appellant.

Government Advocate, for Crown.

The order of the learned Judge was as follows.—

24th Nov. 1913.

JOHNSTONE, J.—This is a reference on the criminal side by the Sessions Judge of Ferozepur upon a question of local jurisdiction. A theft was alleged to have taken place in the Goods Shed of Bhatinda Railway Station.

The case was tried by the 1st class Magistrate, Ferozepur, and on conviction the accused appealed to the Sessions Court, Ferozepur, where the question of jurisdiction was raised.

The ordinary law is contained in section 177, Criminal Procedure Code, which runs thus :—

“ Every offence shall ordinarily be inquired into and
“ tried by a Court within the local limits of whose jurisdiction
“ it was committed.”

But Bhatinda Railway Station is in the Native State of Patiala and we have therefore to turn to India (Foreign Jurisdiction) order in Council, 1902, and to the Notifications issued under it by the Government of India, in order to decide what Courts have jurisdiction in aforesaid Goods Shed.

These Notifications, so far as we are concerned with them, here, are two, No. 515 I. B. and No. 516 I. B. of 17th March

1913, republished from the Gazette of India in the Punjab Gazette of 28th March 1913, Part II, pages 99 to 103. I agree with the learned Sessions Judge in rejecting the theory put forward by the Public Prosecutor of his Division regarding the scope of these Notifications, both of which seem to me to apply to the administration of justice. Paragraph 4 of the Order in Council has four clauses, of which the first three may be reproduced (in brief) thus :—

- (a) for determining the law and procedure to be observed ;
- (b) for determining the persons, who are to exercise jurisdiction, and the powers to be exercised by them ;
- (c) for determining the courts, authorities, Judges and Magistrates by whom jurisdiction is to be exercised.

Turning to Notification 515 I. B. aforesaid I am of opinion that clause (1) in it corresponds to (a) in the order, and clause (3) in it corresponds to (c) in the order ; while of Notification 516 I. B. the whole of Part I, Criminal Jurisdiction and the appropriate part of the first schedule, page 102, corresponds to (b) in the order.

The questions to be answered are what Courts have magisterial jurisdiction in Bhatinda Railway Station and what Court has appellate jurisdiction over these Courts. As Mr. Talbot has pointed out in his referring order, the Notification 515 I. B., while it defines clearly enough the Courts that have jurisdiction in this and that section of this and that Railway, ignores the fact that Bhatinda Junction is part of more than one Railway System and more than one section of Railway lines. Thus, according to the Notification the Courts of Hissar District and those of Ferozepur have concurrent jurisdiction in that station under its clause (3) and its schedule, and trial by neither of cases occurring there can be said to be illegal. The arrangement is however inconvenient, and I therefore direct that, for the purposes of this Notification, Bhatinda Railway Station be deemed part of the North-Western Railway System and that the Ferozepur Courts shall exercise jurisdiction there, and not the Hissar Courts.

It is as well to note here that the second Notification No. 516 I. B. has no application as regards *original* jurisdiction in the present case. It only applies when the case to be tried is one for a District Magistrate with section 30 powers or a Court of Session.

But as regards appellate jurisdiction in the case before me there is ambiguity. Here Notification 516 I. B. is supplementary to No. 515 I. B., and the schedule makes it clear that appeal lies to the Political Agent for the Phulkian States and Bahawalpur.

Copy of this order should be sent to the Sessions Judge, Ferozepur, and the appeals and records should be forwarded to the Political Agent aforesaid for trial, together with another copy of this order.

No. 8.

*Before Hon. Sir Alfred Kensington, Kt., Chief Judge, and
Hon. Mr. Justice Shah Din.*

NADIR—(CONVICT)—APPELLANT

Versus

CROWN—RESPONDENT.

Criminal Appeal No. 935 of 1913.

Indian Evidence Act, 1 of 1872, section 25—Confession in presence of a Police officer—admissibility of.

Held, that a confession made by an accused person, while he was in the custody of a jailor, is admissible in evidence notwithstanding that a Police officer was present at the time when the confession was made.

I. L. R. 20 Bom. 795 (1) followed.

Appeal from the order of A. E. Martineau, Esquire, Additional Sessions Judge of the Jhelum Division, at Rawalpindi, dated the 16th October 1913.

Fazl Ilahi, for appellant.

Government Advocate, for respondent.

The judgment of the Court was delivered by—

19th Jany. 1914.

SHAH DIN, J.—

* * *

[The following portion of the judgment only is required for the purpose of this report.]

As we have said above immediately after his capture in March 1912 the appellant was identified by several of the prosecution witnesses in the Jhelum Jail on the 19th March 1912. The identification seems to have been carried out in a satisfactory manner, and on this point the evidence of the Jailor, P. W. 2, of the Head Constable, P. W. 3, and of the Assistant Jailor, P. W. 14, is conclusive. In the course of the identification proceedings a short conversation took place between the appellant on the one hand and Nawab Khan Zaildar, P. W. 4, and Ghulam Hussain, P. W. 5, on the other, and that conversation has been relied on by the learned Government Advocate as amounting partly to a confession of guilt on the part of the

(1) (1895) *I. L. R. 20 Bom. 795 (Queen Empress v. Taty Bin Appaji)*.

appellant. This conversation was noted down in his pocket book at the time by P. W. 2, Mirza Nawab Beg, Jailor, and the record of the conversation has been proved by that witness (Exhibit P. F. page 4). The note runs as follows :—

“After the identification of Nadir accused was over, he requested me to allow him to have a talk with Nawab Khan to whom he wanted to say something, but I did not grant his request. When, however, all the witnesses began to pass by the front, the accused stood up and thus addressed Nawab Khan :—‘Chaudhri Nawab Khan it was your good luck that you escaped my hands. Nawab Khan replied ‘I had no previous enmity with you. You will meet retribution from God for the murders that you have committed.’ The accused rejoined ‘I cannot be convicted on your evidence and identification, and if I am let off I will meet you.’”

Ghulam Hussain said to the accused ‘you are not so strong a man.’ The accused replied ‘if I was not such a strong man why did all of you conceal yourselves and none of you came forward on the day of the occurrence.’

The learned Sessions Judge has excluded from consideration this note of the conversation between the appellant and Nawab Khan and Ghulam Hussain, on the ground that the conversation took place in the presence of a Police officer, viz., Sub-Inspector Abdul Aziz, P. W. 3, and is, therefore, inadmissible in evidence as a confession made by the appellant. The learned Judge does not quote the section of the Evidence Act under which he has excluded this confession, and in our opinion he has erred in law in excluding it, because it does not fall within the purview of either section 25 or section 26 of the Indian Evidence Act. The confession contained in the conversation was not made to a Police officer, nor was the appellant at the time of making the confession in the custody of a Police Officer (he being then in the custody of the Jailor who was in no sense of the term a Police officer), and we fail to understand on what ground the conversation in question can be excluded from consideration. The case of *Queen-Empress v. Tatya Bin Appaji* (I. L. R. 20, Bom. 795) (1), is in point; and following that authority, we hold that the conversation between the appellant and Nawab Khan and Ghulam Hussain which amounts to a confession and which has been duly proved by the Jailor can be treated as evidence against the appellant.

* * * * *

Appeal dismissed.

No. 9.

Before Hon. Mr. Justice Johnstone.

AHMADA AND LALU—(CONVICTS)—PETITIONERS

Versus

CROWN—(RESPONDENT).

Criminal Revision No. 1320 of 1913.

Indian Penal Code, sections 415, 419—cheating by impersonation—inducing a Muharrir of a fair to write wrong names into the sale certificate of a mare.

Ahmada and Lalu, accused, induced the muharrir at a fair to write out a certificate of sale of a mare giving Sultan as the name of the seller and Lalu as the purchaser. Ahmada posed as Sultan, and affixed thereto his thumb-mark. It was found by the Sessions Judge that (i) it was not proved that the mare was stolen property, (ii) it was, however, come by in some doubtful fashion, (iii) that the muharrir was deceived.

Held, that the petitioners were rightly convicted under section 419 of the Penal Code, whatever reason they had for deceiving the muharrir and inducing him to write a false certificate.

36 P. R. (Cr.) 1888 (1) and 20 P. R. (Cr.) 1889 (F. B.) (2), followed.

I. L. R. 17 Cal. 606 (3) and 12 Cal. W. N. 750 (4), referred to.

Held also, that the deliberate opinion of an expert that two thumb marks agree is on a different plane from an opinion as to handwriting and such evidence was in this case sufficient to prove Ahmada, accused's thumb-mark to the certificate.

18 P. W. R. 1912 (p. 28) (5), 1 Cal. L. J. 385 (6), and I. L. R. 32 Cal. 759 (765) (7), referred to.

Revision from the order of B. H. Bird, Esquire, Additional Sessions Judge, Shahpur Division, at Lyallpur, dated the 4th July 1913.

Nabi Bakhsh, for petitioners.

Govind Das, for respondent.

The judgment of the learned Judge was as follows :—

15th Nov. 1913.

JOHNSTONE, J.—In this case the accused, Ahmada and Lalu, were *chalaned* upon section 419, Indian Penal Code, for cheating one Shams-ud-din (P. W. 2), a *muharrir* at Lyallpur Fair, by persuading him, in the exercise of his duty, to write in a *parchi* or certificate of sale of a mare that Lalu was the purchaser and one, Sultan, the seller and affixing his thumb-mark. The learned Magistrate before whom the case came for trial, after recording

(1) 36 P. R. (Cr.) 1888 (*Nand Lal v. Empress*).

(2) 20 P. R. (Cr.) 1889 (F. B.) (*Crown v. Mohabat*).

(3) (1890) 17 Cal. 606 (*Mojey v. Queen-Empress*).

(4) (1908) 12 Cal. W. N. 750 (*Mahadev Lal v. Dhanraj*).

(5) 18 P. W. R. 1912 (p. 28) (*Jalal-ud-din v. Crown*).

(6) (1905) 1 Cal. L. J. 385 (*Pancha Mondal v. Emperor*).

(7) (1905) 32 Cal. 759 (765) (*Emperor v. Abdul Hamid*).

the evidence for the Crown, thought that the offence disclosed by the evidence was forgery punishable under section 465, Indian Penal Code, and drew up a charge accordingly, and in the end found both accused guilty as charged and sentenced them to twelve months' rigorous imprisonment.

On appeal the learned Sessions Judge remarked that the Magistrate, in holding that no cheating by personation had occurred, had overlooked the fact that the *muharrir*, Shams-uddin, had been deceived. Later in his judgment the learned Sessions Judge remarks that conviction under section 419, Indian Penal Code, can be supported on the record and goes on to say :—

“ The prosecution has not succeeded in shewing that the
“ mare to whom (*sic*) the certificate related was stolen property,
“ but there is little doubt that she was come by in some doubtful
“ fashion, otherwise the proceedings of the two brothers at
“ the horse fair would be a meaningless farce. I uphold the
“ convictions and dismiss both appeals.”

The learned Judge who admitted this revision did so because of a doubt in his mind whether on the Sessions Judge's findings a conviction under section 419, Indian Penal Code, could be sustained. The Sessions Judge's findings of fact seem to be :—

- (i) the mare is not proved to be stolen property.
- (ii) it was, however, come by in some doubtful fashion.
- (iii) the *muharrir* was deceived.

The definition of cheating in section 415, Indian Penal Code, runs thus :—

“ Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to cheat.”

Mr. Nabi Bakhsh in this connection draws my attention to several rulings such as *I. L. R. 17 Cal. 606* (1), and rulings of the Madras High Court, and argues that no harm was caused, or was likely to be caused, to the *muharrir* by the alleged

(1) (1890) *I. L. R. 17 Cal. 606* (*Mojey v. Queen-Empress*).

deception, the possibility of his getting into trouble being very remote. On the other hand, in 12 C. W. N. 750 (1), where a person went to an opponent's pleader and, pretending that he was one of that pleader's clients, tried to induce him to write a letter that would have damaged the opponent's case, it was held that cheating of that pleader by personation was complete.

But, to whatever extent High Courts may have contradicted themselves and each other, I find in the rulings of this Court principles laid down which I must follow. In 36 P. R. (Cr.) 1888 (2), it was held that "intentionally" in section 415 aforesaid only governs the clause in which it occurs, and in 20 P. R. (Cr.) 1889 (F. B.) (3), it was laid down that the words "fraudulently or dishonestly" only qualify the first part of the section, and in both cases the facts are in line with those of the present case. In the later ruling, indeed, the facts are so exactly on all-fours with those now before me that, when I find the Full Bench their upholding a conviction under section 419, Indian Penal Code, there is nothing more to be said on this aspect of the case.

The other points raised need not detain us long. It is contended, on the strength of 18 P. W. R. 1912 (p. 28) (4), a case of handwriting experts—1 C. L. J. 385 (5), and 1 L. R. 32 Cal. 765 (6) (thumb impression cases), that, inasmuch as here the only evidence, that the thumb-mark on the *parchi* is Ahmada's, and no other person's, is the opinion of the expert, the fact should not be considered sufficiently proved. [The *mukharri* cannot identify the affixer of the mark, as is natural enough.]

My view here is that each case must be dealt with on its own merits; and, in my opinion, the deliberate opinion of an expert that two thumb-marks exactly agree is on quite a different plane from an opinion as to handwriting. It is a reasonable deduction from experience that no two human beings have the same thumb-markings, and, if no differences whatever can, after the most careful examination, be found between one thumb-mark and another, the conclusion is irresistible that the same thumb made both. Add to this that Sultan, the alleged vendor, seems to be a mythical person.

The facts, then, have been rightly found against the petitioners; and the absence of proof that the mare had actually

1. (1908) 12 C. W. N. 750 (*Mahader Lal v. Dhanraj*).

2. 36 P. R. (Cr.) 1888 (*Nand Lal v. Empress*).

3. 20 P. R. (Cr.) 1889 (F. B.) (*Crown v. Mohabat*).

4. 18 P. W. R. 1912 (p. 28) (*Jatal-ud-din v. Crown*).

5. (1905) 1 C. L. J. 385 (*Pancha Mondal v. Emperor*).

6. (1905) 1 L. R. 32 Cal. 759 (765) (*Emperor v. Abdul Hamid*).

been stolen, is immaterial. For whatever reason, petitioners *did* deceive the *muharrir* and did induce him to write a false certificate and they are thus, under the rulings of this Court, guilty of cheating by personation. Petitioners do not ask for a further opportunity to produce defence evidence in view of the lower appellate Court's virtual alteration of the sections from 465 to 419.

I dismiss the petition.

Revision rejected.

No. 10.

*Before Hon. Mr. Justice Johnstone and Hon
Mr. Justice Beadon.*

MUSSAMMAT FATIMA—(CONVICT)—APPELLANT

Versus

CROWN—(RESPONDENT).

Criminal Appeal No. 677 of 1913.

Indian Evidence Act, I of 1872, section 122—wife charged with murder of her husbands' son by a former wife—admission of confession by wife to husband—value of retracted confession made while in Police custody.

Held, in proceedings in which the wife is charged with the murder of her husband's son by a former wife—confessions made by the wife to the husband and evidence of the alleged pointing out by her to him alone of the body of the child are not admissible in evidence, the crime not being one committed against the other within the meaning of section 122 of the Evidence Act.

24 P. W. R. 1913 (1), referred to.

Held also, that a confession by the woman made while in Police custody, to which she had been relegated by her own husband and to which she was remanded after the confession was made, is of little value when it is retracted only five days later before the same Magistrate.

I. L. R. 18 All. 78 (2), referred to.

Appeal from the order of Khan Bahadur Khan Abdul Ghafur Khan, Khan of Zaida, Sessions Judge, Ludhiana Division, dated the 9th August 1913.

Brij Lal, for appellant.

Nemo, for respondent.

The judgment of the Court was delivered by—

JOHNSTONE, J.—In this case Mussammat Fatima, *alias* Fattan, wife of Abdullah, Arain, of Mohallah Chhaoni, Ludhiana, has been convicted by the Sessions Court of the crime of murdering her step-son, Abdul Karim, a little boy of three and a half years of age by strangulation with her hands, and, in view

16th Nov. 1913.

(1) 24 P. W. R. 1913 (*Mulkhi v. Crown*).

(2) (1895) I. L. R. 18 All. 78 (*Empress v. Mahabir*).

of the fact that she was pregnant when under trial—she has since then given birth to a child—instead of a capital sentence the more lenient punishment of transportation for life has been inflicted. She has appealed, declaring her innocence, and we have heard her case argued by Mr. Brij Lal, her counsel. We have given this somewhat difficult case our most anxious consideration, and I have arrived at the conclusion that the evidence on the record, so far as it is in law admissible and relevant, is insufficient to support the conviction.

The theory of the prosecution is that on the afternoon of 17th June last she took the child out to a pond to the south of the canal bungalow and there throttled it with her hands after removing from its neck a silver *tawiz* on a black thread, and then threw the body and the *tawiz* into the water. The learned Sessions Judge has found this theory established upon evidence which may be classified thus :—

- (i) the confession of the appellant before the committing Magistrate on 21st June 1913 ;
- (ii) the previous alleged confession by her to her husband on 18th June and the alleged pointing out by her on that day to him alone of the body floating in the pond ;
- (iii) the production by her of the *tawiz* and thread from the pond on 19th June at 3 p.m. in presence of the police and others ;
- (iv) the depositions of Mussammat Rani, wife of Abdullah's brother, Ali Sher, and of Mussammat Mehri, wife of Rukn-ud-din, to the effect that they had seen appellant carrying the child away from home on the afternoon of the 17th June.

In admitting the evidence under head (ii) above the learned Sessions Judge misunderstood section 122 of the Indian Evidence Act. In view of the wording of that section and of the interpretation put upon it in 24 *P. W. R.* 1913 (1), I have no hesitation in holding that that evidence should never have been admitted ; and the effort must be made to imagine what the case against the appellant would amount to if it had been excluded. The learned Sessions Judge has taken it that because the alleged murder was of Abdullah's son, therefore the crime was committed "against" him ; but I am unable to agree in this. An offence "against" a person is an offence

calculated to injure his person or property or reputation, as in cases of defamation, and does not, in my opinion, include an offence against a son, though such offence may cause to the father grief of mind.

Then a confession by a woman in police custody, to which she had been relegated by her own husband and to which she was remanded after the confession was made, is of little value, when we find it retracted only five days later before the same Magistrate, cf. *I.L.R. XVIII, All. 78 (1)* and many other rulings. Her explanation is that an officious police officer assured her that confession was her best course and swore on the *Koran* that on confessing she would be released.

[The remainder of the judgment is not required for the purposes of this report.]

Appeal accepted.

No. 11.

Before Hon. Mr. Justice Johnstone.

MOOLA—(CONVICT)—APPELLANT

Versus

CROWN—(RESPONDENT).

Criminal Appeal No. 522 of 1913.

Criminal Procedure Code, section 256—right of accused to have the witnesses for the prosecution cross-examined after charge is framed.

Held, that the provisions of section 256 of the Criminal Procedure Code, are imperative and an accused, after a charge has been framed against him, should be required to state whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken, and the omission to follow section 256, usually involves remand and retrial of the case from the point of the drawing of the charge.

I. L. R. 20 Cal. 469 (2), 22 Cal. W. N. 5 (3), I. L. R. 27 Cal. 370 (4), referred to.

Appeal from the order of B. N. Bosworth Smith, Esquire, District Magistrate of the Ferozepore District, dated the 11th June 1913.

Ram Rattan, for appellant,

Nemo, for respondent.

The order of the learned Judge was as follows :—

JOHNSTONE, J.—In this case the learned District Magistrate of Ferozepore has convicted one Moola under section 411-75, Indian Penal Code, and sentenced him to seven years' transportation. The two bullocks stolen were the property of Manohar

24th Nov. 1913.

(1) (1895) *I. L. R. 18 All. 78 (Empress v. Mahabir).*

(2) (1892) *I. L. R. 20 Cal. 469 (Nilkanta Singh v. Queen-Empress).*

(3) (1899) *22 All. W. N. 5 (Queen-Empress v. Kaps).*

(4) (1900) *I. L. R. 27 Cal. 370 (Zamunia v. Ram Tahal).*

Lal, a contractor of Ferozepore. There can be no doubt that they were stolen on the night of 5-6th May 1913, and that a report was made at once. The accused was seen taking these two bullocks early in the next morning by head constable Abdul Ghani, who happened to be on duty in another case, on the kutchra road between Ferozepore and Zira near the village of Walur. Something in accused's conduct roused his suspicions, and so he followed the accused, deputing one of his companions, Mangu by name, P. W. 5, to go and head him off. Mangu shouted to the accused who thereupon ran away, passed through the village of Naju Shah Misri, told the people there that he was on his way to Allah Ditta, *Zaildar*, and so arrived at the village of Saidanwala with the head constable, Shahzada, Anokha and Mangu in hot pursuit. They followed his tracks to Allah Ditta's *haveli*, one or two of the witnesses saying that they actually saw him entering it. Allah Ditta, who was at the door of the house, at first denied that anybody had come there, but ultimately produced the accused, who said then, and says still, that he that morning had been entrusted with the charge of these cattle to take them to Allah Ditta's house. Thereupon the accused was arrested. The case was investigated and he was chalaned.

In the judgment of the learned District Magistrate there are two or three slips, which fortunately do not in the circumstances matter very much. For instance, he says that Abdul Ghani, head constable, was out on duty in another case looking for a stolen buffalo. This is not correct, because in that case the animal missing was a bullock. Again, he talks of Abdul Ghani and his companions pursuing the accused to the Rukan Shahwala village where, he says, the accused entered Allah Ditta's *haveli*. I do not know where he gets the name of Rukan Shahwala from, for the witnesses consistently say that the name of the village is Saidanwala.

There is one section in the Criminal Procedure Code, which is not infrequently ignored by Subordinate Courts, though their attention has been drawn to it by many rulings, and though the section is in itself quite clear. I allude to section 256 in connection with which it has been frequently held that its provisions are imperative and that it is an illegality to neglect them. The relevant portion of the section runs, "he shall be required to state whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken." This was not done in the present case, and it has been made a ground of appeal in argu-

ments before me. I would like to draw the attention of the learned District Magistrate to such rulings as *I. L. R. 20 Cal. p. 469 (1)*, *22 All. W. N. 1902, p. 5 (2)* and *I. L. R. 27 Cal. p. 370 (3)*. No doubt the accused in this case did in a meagre way cross-examine the witnesses for the prosecution, when they were in the witness-box; but this is no reason whatever why section 256 should be ignored, as it has been laid down more than once that it is not until a specific charge has been drawn up and explained to the accused that he is in a position fully to cross-examine the witnesses for the crown, and it is for this reason that the legislature enacted the section aforesaid.

It has been usually held that the omission to follow section 256 involves remand and retrial of the case from the point of the drawing up of the charge, and therefore it must be obvious to the District Magistrates of how vital importance it is that the accused should, in all cases, be asked at the appropriate time if he wishes to recall witnesses for cross-examination. However clear the case may appear to be against the prisoner, the law apparently allows the lower Court no option in this matter, and the result of this sort of carelessness is a great deal of trouble and inconvenience to all concerned.

At the same time I am not inclined to hold at present that Moola has cleared himself of the charge on the record. He certainly ran away when challenged, and the evidence that he offers as to his being employed to transport the cattle to Allah Ditta's house is discrepant. In his favour one point may be here noticed, namely, that he told the villagers of the Naju Shah Misri village that he was going to Allah Ditta, *Zaildar's* house and that he did actually go there. Now, a thief would not ordinarily tell people where he really intended to go.

However, it is unnecessary to discuss the case any further at present, for it must be remanded to the District Magistrate in order that he may give the accused an opportunity to cross-examine the prosecution witnesses. I therefore return the papers to the learned District Magistrate in order that this may be done with as little delay as possible, the result being reported to this Court.

Case remanded.

(1) (1892) *I. L. R. 20 Cal. 469 (Nilkanta Singh v. Queen-Empress)*.

(2) (1899) *22 All. W. N. 5 (Queen-Empress v. Kaps)*.

(3) (1900) *I. L. R. 27 Cal. 370 (Zamunia v. Ram Tahal)*.

No. 12.

Before Hon. Mr. Justice Kensington.

CROWN, THROUGH MUSSAMMAT RAM KAUR

—(COMPLAINANT)—

Versus

WARYAM SINGH AND SAWAN SINGH—(ACCUSED).

Criminal Revision No. 1540 of 1913.

Criminal Procedure Code, 1898, section 488—order against father of husband for his wife's maintenance—wife's application for maintenance because husband married another wife.

Held that an order making the father of the husband jointly liable for his son's wife's maintenance is not contemplated by section 488 of the Code of Criminal Procedure.

26 P. R. (Cr.) 1903 (1), referred to.

Held also, that a wife is not entitled to an order for maintenance merely because her husband has married another wife and she declines to live with him on that account.

66 P. R. (Cr.) 1887 (2), referred to.

Case reported by O. F. Lumsden, Esquire, Sessions Judge, Jullundur Division, with his No. 635, dated the 18th August 1913

The facts of this case are as follows :—

Accused has two wives, the complainant being the first with whom both accused are displeased and have therefore turned her out with her child of two and a half years of age without making any provision for their maintenance.

Hence Ram Kaur proceeded against them under section 488, Criminal Procedure Code.

Both the accused on conviction by Chaudhri Kesar Ram, exercising the powers of a Magistrate of the 1st class in the Jullundur District, were ordered, by order, dated 27th June 1913, under section 488, Criminal Procedure Code, to pay a maintenance of Rs. 12 per mensem to Mussammat Ram Kaur with her child.

The proceedings are forwarded for revision on the following grounds :—

The order charging the husband's father (accused 2) with liability is wrong and should be set aside. Section 488, Criminal Procedure Code, does not provide for any order of the kind and P. R. 26 of 1903 is authority on this point.

(1) 26 P. R. (Cr.) 1903 (*Crown v. Miran*).

(2) 66 P. R. (Cr.) 1887 (*Attar Singh v. Mussammat Dharmo*).

ORDER OF THE CHIEF COURT.

Complainant—Mussammat Ram Kaur, in person.

Petitioners—By Gokal Chand.

KENSINGTON, J.—The Magistrate is clearly wrong in making Sawan Singh, father of Waryam Singh, jointly liable for the maintenance of Mussammat Ram Kaur. No such arrangement is contemplated by section 488, Criminal Procedure Code, and 26 P. R. 1903 (1), Criminal, is a ruling directly in point.

The son, Waryam Singh, husband of Mussammat Ram Kaur, admittedly owns no land in his own right and as against him an order for maintenance at Rs. 12 a month is quite unreasonable.

It is possible that Mussammat Ram Kaur might be entitled to some smaller rate of maintenance as against Waryam Singh alone, but on the present record I do not think that she has established a claim. The real trouble seems to be that she declines to live with Waryam Singh, now that he has contracted a second marriage. This alone does not justify an order under section 488, Criminal Procedure Code—66 P. R. 1887 (Criminal) (2)—and, so far as I can judge from the explanations given by the parties before me, the husband is willing to maintain his wife provided that she lives with him.

The revision is accordingly allowed. The Magistrate's order of 27th June 1913 is set aside, and the application is dismissed.

Revision accepted.

No. 13.

Before Hon. Mr. Justice Shah Din.

BEJA AND OTHERS,—(CONVICTS)—APPELLANTS.

Versus

EMPEROR—(RESPONDENT).

Criminal Appeal No. 573 of 1913.

Indian Penal Code, sections 401 and 413—Wandering gang of thieves—essentials constituting the offence—the receiver of the stolen property (the Agoor) is a member of the gang.

Held that under section 401 of the Indian Penal Code, it is necessary to prove—

(1) that there existed a gang of persons ;

(1) 26 P. R. (Cr.) 1903 (*Crown v. Miran*).

(2) 66 P. R. (Cr.) 1887 (*Attar Singh v. Mussammat Dharmoj*).

(2) that those persons were associated for the purpose of committing theft or robbery ;

(3) that theft or robbery was to be committed habitually ; and

(4) that the accused was a member of such gang ;

but that it is not necessary to prove that each individual member of the gang has habitually committed theft or has committed any particular theft in company with the other members.

Once it is proved that a gang, however small, was formed for the purpose of habitually committing theft, all persons who thereafter joined that gang in committing one or more thefts, come within the purview of section 401.

Held also, that the fact that an accused person is of bad character or is reputed to be a thief, or an habitual thief, is no evidence against him for the purpose of a charge under section 401 of the Penal Code.

1 *Cal. W. N.* 146 (1), 1. *L. R.* 27 *Cal.* 139 (2), 1. *L. R.* 32 *Mad.* 179 (3), referred to ; also

6 *M. H. C. R.* 120 (4), 37 *P. R. (Cr.)* 1869 (5), 9 *P. R. (Cr.)* 1880 (6), 6 *All. W. N.* 15 (7), 6 *All. W. N.* 16 (8), 6 *All. W. N.* 65 (9), 18 *P. L. R.* 1910 (10), 10 *Indian Cases* 833 (11) and 36 *P. W. R.* 1912 (12).

Held further, that the *Agoo*, (the habitual receiver of the stolen property in the interests of the members of the gang) though not a thief himself, is a principal member of the gang and that his case falls equally within the provisions of section 401 of the Penal Code.

Appeal from the order of F. L. Brayne, Esquire, Magistrate, 1st Class, exercising enhanced power under section 30 of the Criminal Procedure Code, Karnal, dated the 22nd May 1913.

Kirkpatrick, for Appellants.

Herbert, for Respondent.

The judgment of the learned Judge was as follows :—

[Only the following portion of the judgment is required for the purposes of this report—Ed.]

13th Dec. 1913.

SHAH DIN, J.—So much for the Magistrate's introduction. Before dealing with the individual cases of the three gangs separately it would clear the ground to notice briefly the law applicable to them, which is contained in section 401 of the Indian Penal Code. As to the proper interpretation of that section the following authorities were cited before me on both sides :—

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- (1) (1897) 1 *Cal. W. N.* 116 (*Empress v. Naba Kumar Patnaik*)
 - (2) (1899) 1. *L. R.* 27 *Cal.* 139 (*Mankura Pasi v. Empress*).
 - (3) (1908) 1. *L. R.* 32 *Mad.* 179 (*Public Prosecutor v. Bonigiri*).
 - (4) (1871) 6 *Nad. H. C. R.* 120 (*Sriram Venkatasami*).
 - (5) 37 *P. R. (Cr.)* 1869 (*Pecra v. Crown*).
 - (6) 9 *P. R. (Cr.)* 1880 (*Afred v. Empress*).
 - (7) (1886) 6 *All. W. N.* 15 (*Empress v. Shubba*).
 - (8) (1886) 6 *All. W. N.* 16 (*Empress v. Jahingira*).
 - (9) (1886) 6 *All. W. N.* 65 (*Empress v. Khuda Baksh*).
 - (10) 18 *P. L. R.* 1910 (*Walia v. Crown*).
 - (11) (1911) 10 *Indian Cases* 833 (*Ghulam Mustafa v. Crown*).
 - (12) 36 *P. W. R.* 1912 (*Ishwar Das v. Crown*).

6 *Mad. H. C. R.* 120 (1), 37 *P. R. (Cr.)* 1869 (2), 9 *P. R. (Cr.)* 1880 (3), 6 *All. W. N.* 15 (4), 6 *All. W. N.* 16 (5), 6 *All. W. N.* 65 (6), 1 *Cal. W. N.* 146 (7), 1 *L. R.* 27 *Cal.* 139 (8), 1 *L. R.* 32 *Mad.* 179 (9), 18 *P. L. R.* 1910 (10), 10 *Indian Cases* 833 (11) and 36 *P. W. R.* 1912 (12).

I have carefully considered all these rulings and have given every weight to the respective arguments of Mr. Kirkpatrick and Mr. Herbert as to how far the evidence on the record of each of the cases before me is sufficient for proving the necessary ingredients of the offence, of which the appellants have been convicted by the Magistrate in the Court below. What the decisions of the various High Courts in fact lay down is this.

To sustain a conviction on a charge under section 401, Indian Penal Code, it is necessary to prove—

(1) that there existed a gang of persons;

(2) that those persons were associated for the purpose of committing theft or robbery;

(3) that theft or robbery was to be committed habitually;

(4) that the accused was a member of such gang.

The habitual commission of theft necessarily implies an aggregate of acts by some members of the gang or by all of them, but it is not necessary that each individual member of the gang should be proved to have habitually committed theft in company with the other members. Once it is established that a gang, however small in number, was formed for the purpose of habitually committing theft, all persons who thereafter joined that gang in one or more cases of theft come within the purview of section 401. There may be cases in which an accused person would be guilty under section 401 without proof of his having committed theft either by himself or in company with the other members of the gang, but in such cases there must be very clear evidence of his membership of the gang and of the fact that the gang consisted of persons associated for the purpose of habitually committing theft.

- (1) (1871) 6 *Mad. H. C. R.* 120 (*Sriram Venkasami*).
- (2) 37 *P. R. (Cr.)* 1869 (*Peera v. Crown*).
- (3) 9 *P. R. (Cr.)* 1880 (*Afridi v. Empress*).
- (4) (1886) 6 *All. W. N.* 15 (*Empress v. Shabba*).
- (5) (1886) 6 *All. W. N.* 16 (*Empress v. Jahingira*).
- (6) (1886) 6 *All. W. N.* 65 (*Empress v. Khuda Baksh*).
- (7) (1897) 1 *Cal. W. N.* 146 (*Empress v. Naba Kumar Patnaik*).
- (8) (1899) 1 *L. R.* 27 *Cal.* 139 (*Mankura Pasi v. Empress*).
- (9) (1908) 1 *L. R.* 32 *Mad.* 179 (*Public Prosecutor v. Bonigiri*).
- (10) 18 *P. L. R.* 1910 (*Walia v. Crown*).
- (11) (1911) 10 *Indian Cases* 833 (*Ghulam Mustafa v. Crown*).
- (12) 36 *P. W. R.* 1912 (*Ishwar Das v. Crown*).

The accused, whether he is himself a thief or not, must belong to a gang of persons who make it their business to commit theft; and though it is not essential for the purpose of conviction under section 401 that the evidence against the accused should show the same degree of particularity, accuracy or fulness of details as to the commission of each individual theft in a series of crimes, as is required to support a substantial charge of that crime in a separate prosecution for one act of theft, it is necessary to prove that the person accused was associated with others who were all inspired with the common intention and purpose specified in the section namely, the habitual commission of theft.

The fact of association and that of the habitual commission of theft have however to be proved by evidence which would be admissible according to the Evidence Act, and therefore evidence of bad character or of general repute, such as would be sufficient, for instance, in connection with proceedings under section 110 of the Criminal Procedure Code, is inadmissible against persons who are tried under section 401, Indian Penal Code. The fact that an accused person is of bad character or is reputed to be a thief or an habitual thief is no evidence against him for the purpose of a charge under the aforesaid section.

1 *Cal. W. N.* 146 ('), *I. L. R.* 27 *Cal.* 139 (2) and *I. L. R.* 32 *Mad.* 179 (3).

The gist of Mr. Kirkpatrick's argument was, that in none of the three cases before us had it been proved that there was a gang of persons associated for the purpose of *habitually* committing theft and that the individual appellants belonged to such a gang. The learned Counsel admitted that in order to bring his case within section 401 each individual member of the alleged gang need not have taken part in any single theft committed by the other members thereof, but he insisted that there must be clear proof of association among a reasonable number of persons (according to him generally more than two) for the specific purpose of *habitually* committing theft; that the association must have direct reference to that purpose and to no other; that the habitual commission of theft by the persons constituting the gang must be established by direct evidence as to the commission of individual thefts by some or by all of them jointly, and that if the fact of the association can be referred to some purpose other than the purpose specified in the section in question, then the mere fact

(1) (1897) 1 *Cal. W. N.* 146 (*Empress v. Naba Kumar Patnaik*).

(2) (1899) *I. L. R.* 27 *Cal.* 139 (*Mankura Pasi v. Empress*).

(3) (1908) *I. L. R.* 32 *Mad.* 179 (*Public Prosecutor v. Bongiri*)

of an accused person having been associated with a number of persons who are all inspired with the illegal intention would not make him liable under the section.

In other words, it was contended that even in cases where thefts are proved to have been committed by more than one of the accused persons jointly, it must be shown, for the purposes of section 401, that they were committed not as isolated thefts for the benefit of the thieves themselves, but for and on behalf of the whole gang who were on their trial under that section.

As regards the Agoos, whose position in the three gangs has been explained by the Magistrate it was argued that, on the Magistrate's own showing, they were simply habitual receivers of stolen cattle; and that although they may have received stolen cattle from the alleged members of the three gangs, such receiving must have been for their own benefit, and they had therefore no direct concern with the gang so far as the habitual commission of theft by the gang is concerned. Habitual thieves, if they are associated together for the purpose specified in section 401 may come within its purview, but not habitual receivers of stolen property from those thieves, the case of the latter being specially provided for in section 413 of the Indian Penal Code.

The latter part of the argument can be disposed of in a few words. The evidence in these cases which I shall discuss in its proper place, sufficiently establishes, in my opinion, that the Agoo is an important part of the machinery devised by the fraternity of the thieves in the Karnal District for the purpose of carrying on their depredations successfully. It is not correct to say that these Agoos receive stolen property for their own benefit and on their own behalf; in some instances they keep the stolen cattle in their own possession, while in others they pass them on into other hands; but whether they adopt the one device or the other the object in most cases is to have possession of or control over the stolen cattle in the interests of the thieves who form a gang. Whenever the aggrieved owners succeed in tracing the stolen cattle to the Agoo or to any of the other persons to whom he has passed on the cattle the Agoo himself takes a direct and prominent part in the negotiations for the restoration thereof in such a manner as to show by his conduct that he is not protecting his individual interests solely, but that he is moving in the matter as the representative member of a larger group. The evidence in these cases seems to me to show that the Agoo, though not

himself the thief is a principal member of the gang of thieves and but for his existence as part of the organization the members of the gang would find it risky or difficult to habitually commit the crime of cattle lifting. He is so inextricably mixed up with an organised band of thieves that his alleged individual capacity of receiver of stolen property is indistinguishable from the part he plays in keeping possession of it or in passing it on into safer hands with the primary object of rendering it difficult for the original owners to trace it, the ultimate purpose almost always being to hold the property for the benefit of the thieves as well as of himself. I gather that the chief function of the Agoo in connection with the crime of cattle lifting with which we are dealing in these cases was to afford special facilities for the concealment or disposal of stolen cattle, thus effectually helping in the successful commission of thefts and on the approach of village *Panchayats* to hold negotiations with them as a spokesman of the thieves and where necessary to ward off or delay further action by the *Panchayats* by promising restoration of cattle and sometimes actually restoring them to the real owners. If this much be established by the evidence I do not see how it can be rightly argued that the Agoo is simply and solely an habitual receiver of stolen cattle and that even if he has constant dealings with individual thieves or groups of thieves his case cannot fall within the purview of section 401, Indian Penal Code. As I have said above in order to sustain a charge under that section it is not necessary that an accused person should have committed a single act of theft himself, all that is essential is, that he should belong to a group of persons who are associated for the purpose of habitually committing theft. And this is precisely what in my opinion has been proved to be the position of the three appellants who have been convicted as the Agoos of the three gangs in these cases.

As regards the first branch of Mr. Kirkpatrick's argument the prosecution have of course to prove that each of the appellants belonged to a gang of persons and that those persons were associated for the purpose of habitually committing theft. As laid down in *I. L. R. 32 Mad. 179* (1) "The associating and the purpose of the association may be proved by direct evidence such as evidence that the accused or the accused and others met and determined to join together

(1) (1908) *I. L. R. 32 Mad. 179* (*Public Prosecutor v. Bonigiri*).

“for the purpose of habitually committing dacoity.....
 “In the absence of direct evidence the associating and the
 “purpose of the association may be established by proof of
 “acts from which these may be reasonably inferred.”

It is proof of this latter character that the prosecution claim to have adduced in these cases, and it is a question in each case as to whether that proof is sufficient for the convictions of the appellants in that case under section 401, Indian Penal Code.

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No. 14.

*Before Hon. Mr. Justice Johnstone and Hon. Mr.
 Justice Shah Din.*

ABDULLAH—(PETITIONER).

Versus

CROWN—(RESPONDENT).

Criminal Revision No. 1442 of 1913.

Indian Penal Code, section 489—attempt to cheat.

Accused, having manufactured at home certain spurious trinkets, took them to a goldsmith, shewed them to him, said they were of gold, (which they were not) and that they were stolen property (which was also untrue), said he did not wish to sell them in the bazar and said *kharid lo*. The goldsmith did not buy and the negotiations went no further.

Held that on these facts the accused was rightly convicted of an attempt to cheat under section 489 of the Penal Code.

I. L. R. 8 All. 304 (1), 13 P. R. (Cr.) 1879 (2), 13 P. R. (Cr.) 1881 (3), 40 P. R. (Cr.) 1885 (4), 25 P. R. (Cr.) 1902 (5), 15 P. R. (Cr.) 1907 (6), 6 All. W. N. 290 (7), I. L. R. 16 Cal. 310 (8), I. L. R. 16 All. 409 (9) and I. L. R. 15 All. 173 (10), referred to.

Petition for revision of the order of Major A. A. Irvine, Sessions Judge of the Lahore Division, dated the 21st of July 1913.

Moti Lal, for Petitioner.

Nemo, for Respondent.

The judgment of the Court was delivered by—

JOHNSTONE, J.—In this case the only point for decision is 4th Feb'y 1914.
 whether on the facts as found below the offence of attempting

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- (1) (1886) *I. L. R. 8 All. 304* (*Queen-Empress v. Dhundi*).
 (2) *13 P. R. (Cr.) 1879* (*Ghulam Mahomed v. Crown*).
 (3) *13 P. R. (Cr.) 1881* (*Mograj v. Empress*).
 (4) *40 P. R. (Cr.) 1885* (*Sukha v. Empress*).
 (5) *25 P. R. (Cr.) 1902* (*Paira Ram v. Emperor*).
 (6) *15 P. R. (Cr.) 1907* (*Walidad v. Emperor*).
 (7) (1886) *6 All. W. N. 290* (*Empress v. Tejman*).
 (8) (1888) *I. L. R. 16 Cal. 310* (*Government of Bengal v. Umesh Chunder*).
 (9) (1894) *I. L. R. 16 All. 409* (*Empress v. Kalyan Singh*).
 (10) (1893) *I. L. R. 15 All. 173* (*In the matter of R. MacCrea*).

to cheat has been brought home to the accused person, or whether at most he has only been shewn to have made preparation for cheating.

The facts are that petitioner, having at home manufactured certain spurious trinkets, took them to Nabi Bakhsh, goldsmith, shewed them to him, said they were of gold (which they were not), and that they were stolen property (which was also untrue), said he did not wish to sell them "in the bazar," and said to Nabi Bakhsh, "*Kharid lo.*" Nabi Bakhsh did not buy and the negotiation went no further. He spoke to Lal, witness for prosecution, and to Buta Singh, constable, and, when the things were found to be spurious, petitioner was arrested.

Mr. Moti Lal's argument is that no "attempt" to cheat has been proved because more had to be done by petitioner before wrongful loss would fall upon Nabi Bakhsh, *e.g.*, statement of weight of the articles and of price or rate, weighment and so forth, and he strives to maintain the argument by quoting a number of rulings, namely :

I. L. R. VIII, All. 304 (1), 13 P. R. (Cr.) 1879 (2), 13 P. R. (Cr.) 1881 (3), 40 P. R. (Cr.) 1885 (4), 25 P. R. (Cr.) 1902 (5), 15 P. R. (Cr.) 1907 (6), All. W. N. of 1886, page 290 (7) and he essays to distinguish—

I. L. R. XVI, Cal., 310 (8), I. L. R. XVI, All., 409, (9), I. L. R. XV, All., 173, (10), which seem to us to be against him.

Now there may be cases in which "attempt" is not complete until the actor has done each and every act requisite for the perpetration of the crime ; but we do not think it can be laid down that this is a principle governing all cases. In each and every case the Court has to consider the facts and decide on the merits ; not upon any pedantic or hard-and-fast rule, but in accordance with common sense. In cases of cheating the essential thing is the deception of the victim, the dishonest causing to arise in the victim's mind of an impression, the reverse of truth, calculated to induce him to

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- 1) (1886) *I. L. R. 8 All. 304 (Queen-Empress v. Dhundi).*
 - 2) 13 *P. R. (Cr.) 1879 (Ghulam Mahomed v. Crown).*
 - 3) 13 *P. R. (Cr.) 1881 (Megraj v. Empress).*
 - 4) 40 *P. R. (Cr.) 1885 (Sukha v. Empress).*
 - 5) 25 *P. R. (Cr.) 1902 (Paira Ram v. Emperor).*
 - 6) 15 *P. R. (Cr.) 1907 (Walid v. Emperor).*
 - 7) (1886) 6 *All. W. N. 290 (Empress v. Tejman).*
 - 8) (1888) *I. L. R. 16 Cal. 310 (Government of Bengal v. Umesh Chunder).*
 - 9) (1894) *I. L. R. 16 All. 409 (Empress v. Kalyan Singh).*
 - 10) (1893) *I. L. R. 15 All. 173 (In the matter of R. MacCrea).*

give up something he would not otherwise give up, or to do or refrain from doing something he would not otherwise do or refrain from doing, or to enter into a bargain he would not enter into, if he knew the real facts. Here the petitioner had clearly said things to Nabi Bakhsh, which, if believed by him, would have caused such an impression as that to arise in his mind. The attempt to deceive was complete, and we are unable to see why it should be held that to complete that attempt such further acts as statement of price and rate and weighment were essential. The analogies Mr. Moti Lal would draw from the rulings quoted above are not of much value owing to the want of similarity in the facts, and, in our opinion, it would be a useless waste of time to discuss those rulings at length here.

Mr. Moti Lal has also referred us to certain attempted definitions of the word "attempt" to be found in legal commentaries. We see nothing adverse to our views in the present case in the definition stated by Stephen, which runs thus—"An act done with intent to commit a crime and forming *part* of a series of acts which would constitute its actual commission, if not interrupted." According to this definition the acts done by petitioner clearly amount to an "attempt" to cheat; though we realise that this definition is by no means perfect and might in certain cases let in what was only "preparation." On the other hand, unless cautiously employed, the definition given by Cockburn, C. J., in *McPherson's* case, quoted in notes under section 511, Indian Penal Code, in Rattan Lal's book, 2nd Edition, 1902, might shut out, much that we are inclined to think should in certain circumstances be called "attempt." The learned Judge remarked:—"The word attempt clearly conveys with it the idea that if the attempt had succeeded, the offence charged would have been committed. An attempt must be to do that which, if successful, would amount to the felony charged." We do not know what the facts of that case were; but it seems clear to us that cases can and do arise in which the offence of "attempt" to commit an offence has been committed, even though, in order to the completion of the offence, something more remained to be done by the offender.

In short, definitions in such matters are dangerous things, and the only safe way of deciding in any particular case, whether an "attempt" to commit a crime has been made or not, is to consider the facts of that case and to decide in accordance with the dictates of common sense.

For these reasons we decline to interfere and so reject this petition.

Petition rejected

No. 15.

Before Hon. Mr Justice Johnstone and Mr. Hon Justice Shah Din.

GHULAM MUHAMMAD AND OTHERS—(PETITIONERS).

Versus

KARAM SINGH—(COMPLAINANT)—RESPONDENT.

Criminal Revision No 1496 of 1913.

Criminal Procedure Code, 1898, section 522—legality of order for possession made as a separate proceeding from the conviction and considerable time afterwards.

On 18th January 1912 complainant applied for possession under section 522 of the Code of Criminal Procedure. He had successfully prosecuted the accused persons under section 147 of the Penal Code for forcible seizure of his land, and accused on 20th November 1911 had been convicted and fined and a petition for revision had been rejected.

The application for possession was, on 24th September 1912, consigned to the record-room, because it was held undesirable to proceed with it while a civil proceeding concerning the same land between the parties was going on in the Chief Court. When that civil proceeding was disposed of in favour of complainant, he renewed his application by a petition, dated 19th June 1913.

Held, that the Magistrate was under section 522 of the Code of Criminal Procedure justified in accepting the application.

I. L. R. 23 Bom. 491 (1) and 11 Cr. L. J. 172 (2) approved.

1 Cal. W. N. 308 (3) disapproved.

I. L. R. 25 Cal. 431 (4) I. L. R. 27 Cal. 171 (5) and I. L. R. 25 All. 341 (6), distinguished.

Petition for revision of the order of Babu Gurbakhsh Singh, Honorary Magistrate, 1st Class, Kalar, dated the 2nd July 1913.

Fazal Ilahi, for Petitioner.

Gobind Das, for Respondent.

The judgment of the Court was delivered by—

4th Feby. 1914.

JOHNSTONE, J.—On 18th January 1912 the complainant applied for possession. He had successfully prosecuted the

(1) (1898) *I. L. R. 23 Bom. 491* (*Narayan Govind v. Visaji*).

(2) (1913) *14 Cr. L. J. 172* (*Jatindra Nath v. Emperor*).

(3) (1899) *4 Cal. W. N. 308* (*Mohan Theta v. Rai Chand*).

(4) (1897) *I. L. R. 25 Cal. 434* (*Ram Chandra v. Jityandria*).

(5) (1899) *I. L. R. 27 Cal. 171* (*Ishan Chandra v. Dina Nath*).

(6) (1903) *I. L. R. 25 All. 341* (*Churaman v. Ram Lal*).

accused persons under section 447, Indian Penal Code, for forcible seizure of his land, and accused on 20th November 1911 had been convicted and fined, and a petition for revision had been rejected. The aforesaid application for possession under section 522, Criminal Procedure Code, was, on 24th September 1912, consigned to the record-room, because it was held undesirable to proceed with it while a civil proceeding concerning the same land between the parties was going on in the Chief Court. When that civil proceeding was disposed off in favour of complainant, he renewed his application by a petition, dated 19th June 1913. The 1st Class Magistrate has allowed the application and has passed the order asked for, with the result that the opposite party asks for revision on the ground that the Magistrate had no jurisdiction because of the lapse of time between conviction and order for possession.

The Hon'ble Judge who heard the case in Chambers has referred it to a Division Bench in view of a conflict of authority, and we have now examined the matter ourselves and have heard arguments.

The petitioner quotes :—

4 C. W. N. 308 (1), *I. L. R. XXV, Cal. 434* (2), *I. L. R. XXVII, Cal. 174* (3), *I. L. R. XXV, All. 341* (4).

Of these the second ruling is useless because, though the point was stated, it was not decided, and the third and fourth are useless because they never mention the point at all. The first, however, certainly does lay it down that a legal order under section 522, Criminal Procedure Code, must be an order passed simultaneously with the conviction in the criminal case, and not as a separate proceeding. No reasons for this view are assigned in the very brief judgment, and we can find in the section itself no warrant for it. No doubt the section is not mandatory, but merely says the Court *may* pass a possession order; and we can easily imagine circumstances in which it would be right for the Court to decline to pass such an order. But at all events there is no *illegality* in passing such an order; and in this view we are confirmed by a perusal of *I. L. R., XXIII, Bom. 494*, (5) and *14 Criminal, L. J. 172* (1913), (6) which are both directly in point.

(1) (1899) 4 C. W. N. 308 (*Mohan Theta v. Rai Chand*).

(2) (1897) *I. L. R. 25 Cal. 434* (*Ram Chandra v. Jityandria*).

(3) (1899) *I. L. R. 27 Cal. 174* (*Ishan Chandra v. Dina Nath*).

(4) (1903) *I. L. R. 25 All. 341* (*Churaman v. Ram Lal*).

(5) (1898) *I. L. R. 23 Bom. 494* (*Narayan Govind v. Visaji*).

(6) (1913) *14 Cr. L. J. 172* (*Jatindra Nath v. Emperor*).

Nor can we find that here the Magistrate has erred in the exercise of his discretion. No doubt 20 months had passed when he made the order but this delay is fully explained and complainant seems to have moved the Court promptly enough.

For these reasons we reject the petition.

Petition rejected.

Full Bench.

No. 16.

*Before Hon. Sir Alfred Kensington, Kt., Chief Judge,
Hon. Mr. Justice Johnstone, and Hon. Mr.
Justice Rattigan.*

ABDUL HAQ—PETITIONER.

Versus

CROWN—RESPONDENT.

Criminal Miscellaneous No. 5 of 1914.

Indian Press Act, I of 1910, section 17—period of limitation—interpretation of statutes—power to extend period—Indian Limitation Act, IX of 1908, section 5.

Held, that when the language of an Act is plain and admits but of one meaning it must be enforced and that the Courts are not concerned with any question of the reasonableness of the enactment or of the policy or possible intention of the legislature.

“Maxwell’s Interpretation of Statutes” 1905 Edition pp. 4 and 5, referred to.

Held, consequently, that limitation for an application under section 17 of the Press Act starts from the date of the order of forfeiture.

Held further, that the provisions of section 5 of the Limitation Act are not applicable to such an application.

Application under section 17 of the Indian Press Act 1910 for setting aside the Local Government’s order of forfeiture dated 6th September 1913, forfeiting Rs. 500 security deposited by Abdul Haq of the Rafai-i-am Press, Lahore.

Beechey and Muhammad Iqbal, for petitioner.

Government Advocate, for respondent.

The order of the Court was delivered by—

21st Feb. 1914.

SIR ALFRED KENSINGTON, C. J.—This is an application under section 17 of the Indian Press Act, I of 1910, on behalf of the Keeper of the Rafai-i-am Printing Press, against whom the Local Government issued under section 4 (1) of the Act an order of forfeiture of Rs. 500, security.

We cannot permit discussion of the terms of the Article published in the *Paigam-i-Sulah* newspaper on the 31st July 1913, in respect of which action has been taken, as we hold that the application must be refused on the ground that it has not been presented within the period of two months from the date of the order, prescribed by section 17 of the Act.

The order was issued on the 6th September 1913 and notice of it was served on the applicant on the 16th in the manner required by section 25 of the Act. The application bears date, the 14th November, the last possible date on which it should have been presented being the 6th November.

As this is, so far as is known, the first occasion on which the question of limitation involved has arisen, we have allowed latitude to counsel to urge by any argument he could that the application should be treated as if presented within time, but we cannot accept his contention that the words used in section 17, "within two months from the date of such order" can by any possible principle of construction be read as meaning "within two months from the date on which notice of the order was served."

We are not concerned with any question as to the reasonableness of the provision in section 17, or of the policy or possible intention of the Legislature. In this connection there are some apposite remarks at pages 4 and 5 of Maxwell's "Interpretation of Statutes," 1905 Edition, from which we may usefully quote as follows :—

"When the language is not only plain, but admits of but one meaning, the task of interpretation can hardly be said to arise. . . . The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. It matters not, in such a case, what the consequences may be. Where by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced even though it be absurd or mischievous. . . . However unjust, arbitrary or inconvenient the intention conveyed may be, it must receive its full effect. When once the intention is plain, it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words."

These extracts are given because they exactly apply to the present case, in whatever extreme form the argument can be put, and not because we suggest that there is anything absurd or mischievous in section 17 as it stands. The Legislature may very well have intentionally taken the date of the order as the starting point for limitation, following the familiar practice of legal notices to take effect within a stated period from the date of the notices and not from the date of their receipt by addressees.

It is idle to dwell on the suggested risk that the Local Government would, on our interpretation, have power to deprive the Keeper of a Press of his remedy by the simple expedient of withholding notice of forfeiture till two months had already expired from the date of the order. Difficulty might no doubt conceivably arise if the Local Government should at any time act in so arbitrary a manner, but we need not trouble ourselves with fanciful speculation of the kind, being satisfied that no Government would act in the manner suggested, and that, if there should be inadvertent delay in the communication of an order, all necessary steps would be taken to see that the person affected was not unduly prejudiced.

No question of prejudice arises here. The applicant had ample time to apply between the 16th September and 6th November, and if he or his legal advisers chose to wait till what they supposed to be the latest date without verifying the law on the subject, they must take the consequences.

The remedy given by law is by way of application and not of appeal, and in the absence of some specific provision in the Indian Press Act giving the benefit of section 5, Limitation Act, to such an application it is not in our power to extend the prescribed period even if we could hold that sufficient cause for delay had been established. The point need not be further discussed, as there has here certainly been no such sufficient cause.

We accordingly reject this application to set aside the order of the 6th September 1913.

Application rejected.

No. 17.

*Before Hon. Sir Alfred Kensington, Kt., Chief Judge,
and Hon. Mr. Justice Rattigan.*

CHANDAR BHAN AND RAM LABHAYA—(ACCUSED)—
PETITIONERS

Versus

CROWN—RESPONDENT.

Criminal Revision No. 1965 of 1913.

Indian Companies Act, 1882, section 74—offence of not filing balance-sheet—persons who have ceased to be directors before the expiry of the 12 months allowed.

Held, that persons who had ceased to be directors of a Company before the expiration of 12 months after the Company had been registered, cannot under section 74 of the Companies Act of 1882, be convicted of an offence in connection with the non-filing of a balance sheet, which the Company was not by law obliged to file till the year was complete.

Petition for revision of the order of H. Forbes, Esquire, Sessions Judge, Lahore Division, dated 8th August 1913.

Gokal Chand, for petitioners.

Nemo, for respondent.

The judgment of the Court was delivered by—

SIR ALFRED KENSINGTON, C. J.—The petitioners, Chander Bhan Hooja and Ram Labhaya, young men of very indifferent education and said to be the sons respectively of a retired police sergeant and a deceased *patwari*, have been convicted under section 74, Indian Companies Act, VI of 1882, and sentenced to fines of Rs. 200 each. 12th March 1914.

The Company here concerned was registered as “The Indian National Benefit Society, Limited, Lahore,” on the 8th April 1911, its professed objects were on the same grandiose scale as those of another Society started in 1911, in which also Chander Bhan took a prominent part, discussed in our judgment in Criminal Revisions Nos. 1966 and 2049 of 1913.

The Articles of Association for both Companies were practically identical, and adopted almost in block from a standard form in use elsewhere. The learned Sessions Judge dealt with the two cases on one day, and we can only suppose that he was misled by such features as are common to the two cases into assuming, without looking carefully into the matter, that the convictions were here equally justified. It may very well be the case that the connection of the petitioners with the present

Company was discreditable to begin with and possibly dishonest, but it is quite clear to us that their convictions cannot stand.

The petitioners joined the Company as Directors in August and September 1911, but both resigned their posts early in March 1912, transferring their qualification shares to their successors. It is alleged by them, and apparently with truth, that they took no fees as Directors and attended no meetings during their brief connection with the Board. The Sessions Court has assumed that they continued to be Directors for over 11 months, but of this there is no proof and we observe that none of the documents referred to in the Magistrate's record as Ex. P. A., B C. or D. A. are to be found on that record. Act VI of 1882 is not precise on the point, but under English law the mere ceasing to hold the necessary qualification shares involves vacation of his office by a Director, and this is made clear by section 85 (2) of the new Act, VII of 1913.

The petitioners have been convicted as Directors on account of failure to file a balance-sheet with the Registrar of Joint Stock Companies within twelve months after the Company had been registered. On the present meagre record we must hold that they were not Directors when the year expired, and the lower Courts are clearly mistaken in thinking that they can nevertheless be fixed with liability because they held office temporarily for some 6 months of the year. The Company was not by law obliged to file a balance-sheet till the year was complete, and no Directors could compel the Managing Director or other officials to prepare that balance-sheet at an earlier stage. The petitioners ceased to have even a nominal voice in the affairs of the Company from at latest the 12th March 1912, and the balance-sheet was not due till the 8th April. It is neither sound law nor common fairness to expect them to do that which they had no power to do during the intervening period of nearly a month, and we can only suppose that these men were proceeded against because the real culprits, the Managing Director and others, had disappeared before the prosecution was started on a complaint, dated 5th December 1912.

We are certainly not prepossessed in favour of the petitioners who may well have known all along that no good could come of a Company launched on the public in the reckless and deceptive manner indicated by what little we can gather as to its history. The petitioners are however saved from liability on the present charge against them by the fact that they severed their connection as Directors in time.

The revision is accordingly allowed. The convictions of both men are set aside and their fines of Rs. 200 each will be refunded if paid.

Revision allowed.

No. 18.

*Before Hon. Sir Alfred Kensington, Kt., Chief Judge,
and Hon. Mr. Justice Rattigan.*

SADAR DIN—(PETITIONER)

Versus

CROWN—(RESPONDENT).

Criminal Revision No. 31 of 1914

Legal Practitioners Act, XVIII of 1879, section 3 (as amended by Act XI of 1896)—touts—Revision by Chief Court of order of a District Magistrate framing a list of touts—Punjab Courts Act, XVIII of 1884, section 13.

Held, that the Chief Court has no power to revise an order of a District Magistrate under section 36 of the Legal Practitioners Act, directing that the name of a person should be included in a list of touts, such an order being neither a criminal nor a civil proceeding, nor subject to the Chief Court's power of superintendence and control under section 13 of the Punjab Courts Act.

I. L. R. 21 All. 181 (1), I. L. R. 31 All. 59 (2), 11 Cal. L. J. 513 (3), 16 Indian Cases 895 (4), 41 P. R. (Cr.) 1888 (5) and 11 P. R. (Cr.) 1909 (6), referred to.

3 P. R. (Cr.) 1900 (7), disapproved.

Petition for revision of the order of H. Scott-Smith, Esquire, Sessions Judge of the Ferozepore Division, dated the 27th day of November 1913.

Ganpat Rai, for petitioner.

Government Advocate, for respondent.

The judgment of the Court was delivered by—

RATTIGAN, J.—By order dated the 9th September 1913, the District Magistrate of Ferozepore directed that the name of the petitioner, Sadr-ud-Din, and the names of six other persons, specified in the said order, should be included in a list of "touts" 27th April 1914.

(1) (1899) *I. L. R. 21 All. 181* (In the matter of the petition of Madho Ram).

(2) (1908) *I. L. R. 31 All. 59* (In the matter of the petition of Kedar Nath).

(3) (1910) *11 Cal. L. J. 513* (Hari Charan Sircar v. District Judge of Dacca).

(4) (1912) *16 Indian Cases 895* (Ravinuthala v. Secretary of State).

(5) *41 P. R. (Cr.) 1888* (Jaimal Singh v. Bhagwan Das).

(6) *11 P. R. (Cr.) 1909* (Man Singh v. Emperor).

(7) *3 P. R. (Cr.) 1900* (Chanan Das v. Queen-Empress).

to be hung up in his own Court and in all Courts subordinate to his Court. This order was passed by the District Magistrate as such, and purports to be one under section 36 of the Legal Practitioners Act of 1879, as subsequently amended.

This Court is asked to revise the said order on various grounds, but obviously the first question to be decided is whether we have jurisdiction to revise it. In our opinion, based upon authority, we have no such jurisdiction. It has been repeatedly held that proceedings under section 36 of the Legal Practitioners Act are neither civil proceedings governed by the provisions of the Code of Civil Procedure, nor Criminal proceedings governed by the Criminal Procedure Code, and that as a result neither the Civil nor the Criminal jurisdiction of the High, or Chief, Court can be invoked for the purpose of revising orders passed under that section (see *I. L. R. XXI All. 181* (1), *XXI All. 59* (2), *XI Cal. L. J. 513* (3), *16 Indian Cases 895* (4), *11 P. R. (Cr.) 1909* (5) and *No. 41 P. R. (Cr.)* (6)). On the other hand the High Courts have held that in the exercise of the general powers of superintendence and control vested in them under the provisions of section 15 of the High Courts Act (24 and 25, Vict., C. 104), they have jurisdiction to interfere with such orders, and in *No. 11 P. R. (Cr.) 1909* (5), a Division Bench of this Court decided that it had similar jurisdiction, under section 13 of the Punjab Courts Act, in cases where an order under section 36 of the Legal Practitioners Act, had been passed by a Civil Court.

But section 13 of the Punjab Courts Act gives this Court a power of superintendence and control only over Civil Courts and the provisions of that section are not relevant to a case such as the present where this Court is asked to revise the order of a *District Magistrate* who has, in that capacity, taken action under section 36 of the Legal Practitioners Act. With such an order we are not empowered by any provision of law to interfere and we must accordingly reject this and the connected petitions on that ground.

It is, no doubt, true that in a Single Bench ruling, reported as *No. 3 P. R. (Cr.) 1900* (7), a late Chief Judge of this Court held that under section 13 of the

(1) (1899) *I. L. R.* 21 *All.* 181 (*In the matter of the petition of Madho Ram*).

(2) (1908) *I. L. R.* 31 *All.* 59 (*In the matter of the petition of Kedar Nath*).

(3) (1910) 11 *Cal. L. J.* 513 (*Hari Charn Sircar v. District Judge of Dacca*).

(4) (1912) 16 *Indian Cases* 895 (*Ravinthala v. Secretary of State*).

(5) 11 *P. R. (Cr.)* 190 (*Man Singh v. Emperor*).

(6) 41 *P. R. (Cr.)* 188 (*Jaimal Singh v. Bhagwan Das*).

(7) 3 *P. R. (Cr.)* 1900 (*Chanan Das v. Queen-Empress*).

Punjab Courts Act he had jurisdiction to revise an order of this kind passed by a District Magistrate but speaking with every deference, we are of opinion that that decision is erroneous in law. Nor are we able to accept Mr. Gaupat Rai's argument that proceedings under section 36 of the Legal Practitioners Act are essentially civil proceedings and that an order passed thereunder by any Court or officer must be regarded as the order of a Civil Court. Obviously this is not so, for the result otherwise would be that an order of the Financial Commissioner under section 36 of the Legal Practitioners Act would become revisable by this Court, and this too, despite the fact that the Financial Commissioner is in no sense subject to this Court's general powers of superintendence and control.

* * * * *

For the reasons given, we hold we have no jurisdiction to entertain this petition and we accordingly reject it.

Petition rejected.

No. 19.

Before Hon. Mr. Justice Johnstone.

CROWN

Versus

HAR KISHAN LAL.

Criminal Revision No. 1950 of 1913.

Indian Companies Act, VI of 1882, section 74—fixed penalty for not filing Balance sheet—Court has no discretion—revision by Chief Court—discretionary.

Held, that under section 74 of the Companies Act, 1882, the penalty for not filing a Balance sheet is fixed and the Court has no discretionary power to inflict a lesser fine.

Held also, that the Chief Court in exercise of its extraordinary revisional jurisdiction has a discretionary power to interfere, or refuse to interfere, with an illegal order inflicting a lesser fine and that the present case was one in which the Court should interfere and enhance the fine to the amount fixed by law.

19 P. W. R. (Cr.) 1910 (1), and 29 P. W. R. (Cr.) 1913 (2), referred to.

Case reported by Major A. A. Irvine, Sessions Judge, Lahore, with his No. 1222, dated the 8th day of November 1913.

Government Advocate, for Crown.

Dharam Das for accused.

(1) 19 P. W. R. (Cr.) 1910 (*Abdul v. Crown*).

(2) 29 P. W. R. (Cr.) 1913 (*Crown v. Hari Singh*).

The facts of this case are as follows :—

It is alleged that Lala Har Kishan Lal as Managing Director of the Golden Ginning and Press Company, Limited, Lahore, failed to call a general meeting of the shareholders and to publish a Balance sheet annually between 8th August 1910 and 2nd January 1913.

The accused, on conviction by Mr. J. D. Anderson, exercising the powers of a Magistrate of the 1st class in the Lahore District, was sentenced, by order dated 17th July 1913, under section 47 of the Indian Companies Act, to a penalty amounting to Rs. 300 or to undergo simple imprisonment for three days.

The proceedings are forwarded for revision on the following grounds :—

This is a petition for revision of the order of a 1st class Magistrate, dated 17th July 1913, sentencing the respondent Lala Har Kishan Lal to a penalty of Rs. 300 under section 74 of the Indian Companies Act (Act No. VI of 1882). The respondent was Managing Director of the Golden Ginning and Press Company, Limited, Lahore.....and he admitted, through his counsel, the facts alleged by the prosecution, *viz.*, that no general meeting was called in January 1911, and that no Balance sheet of the Company was published during the year. Apparently no Balance sheet was published between 8th August 1910 and 2nd January 1913. The Magistrate, exercising his discretion, inflicted a penalty of Rs. 300.

Counsel for the Crown has urged that the penalty under section 74 of the Act now in force is a *fixed penalty*—Rs. 1,000 ; and that the Magistrate could not exercise discretion so as to inflict the lesser penalty. Counsel relies on *I. L. R. XXXV All. 173 (1)*.

Respondent's counsel has not wished to oppose the point that Rs. 1,000 is the *fixed penalty* ; but has cited 19 *P. W. R.* 1910 (2), 29 *P. W. R.* 1913 (3), 7 *P. R.* 1889 (4), 17 *P. R.* 1898 (5), and 19 *P. R.* (Cr.) 1905 (6), rulings. His point is that, as the Chief Court has, in certain cases, declined to interfere on revision there is no necessity for this Court to send the present proceedings to the Chief Court. I see no

(1) 1913) *I. L. R.* 35 *All.* 173 (*Emperor v. Dina Nath*).

(2) 19 *P. W. R.* (Cr.) 1910 (*Abdul v. Crown*).

(3) 29 *P. W. R.* (Cr.) 1913 (*Crown v. Hari Singh*).

(4) 7 *P. R.* (Cr.) 1889 (*Empress v. Chuni Lal*).

(5) 17 *P. R.* (Cr.) 1898 (*F. B.*) (*Queen-Empress v. Saif Ali*).

(6) 19 *P. R.* (Cr.) 1905 (*King-Emperor v. Maidhan*).

force in this argument, it is not for this Court to decide whether the Chief Court be likely to interfere or not. It appears that section 74 of the Act of 1882 contemplates a *fixed penalty*, consequently, the Magistrate's order was wrong, and there is a case for enhancement.

I may, however, note that in the new Act (VII of 1913), not yet in force, the words "not exceeding" have been inserted in section 131 (4), thereby allowing a Court discretion as to the amount of the penalty, and possibly indicating what was the *intention* of section 74 of the Act of 1882.

As no ruling of the Punjab Chief Court exists on the point, I report the case for the orders of the Chief Court, under section 438, Criminal Procedure Code.

Petition accepted.

Government Advocate, for Crown.

Dharm Das Suri, for accused.

The order of the Chief Court was delivered by--

JOHNSTONE, J.--It is admitted that according to law the fine should have been Rs. 1,000 and that a fine of Rs. 300 is illegal. The question is whether this Court should exercise its extraordinary revisional jurisdiction and interfere. The rulings quoted by the learned Sessions Judge as having been cited by accused's counsel are beside the mark except perhaps 19 P. W. R. 10 (1) and 29 P. W. R. 13 (2). I was responsible for the earlier of those rulings myself, and I am still of opinion that I have the power to refuse to interfere; but in the present case, notwithstanding the recent change in the law referred to by the Sessions Judge, I think the full fine should be levied. The offence was a very serious one. The neglect to hold a general meeting and to publish a Balance sheet must have misled, or at least have left in the dark, very many shareholders and the public as to the true situation of the Company's affairs, and no lengthy argument is required to show how disastrous such neglect must prove in the case of a Company moving towards insolvency. I direct that the fine be enhanced to Rs. 1,000 and that in default of the payment of the unpaid portion (Rs. 700) the accused do suffer 15 days' simple imprisonment.

19th Jan. 1914.

(1) 19 P. W. R. (Cr.) 1910 (*Abdul v. Crown*).

(2) 29 P. W. R. (Cr.) 1913 (*Crown v. Hari Singh*).

No. 20.

Before Hon. Mr. Justice Rattigan.

BANWARI LAL—(CONVICT)—PETITIONER.

Versus

CROWN—RESPONDENT.

Criminal Revision No. 1047 of 1913

Excise Act, XII of 1896, sections 48 and 53—cocaine in possession of accused's mistress—Penal Code, section 27—joint trial of persons separately in possession of cocaine—Criminal Procedure Code, 1898, section 239.

One S. L. occupying one room in a certain house was found in possession of cocaine and cocaine was also found in another room of the same house occupied by one Mussammat P., the accused B. L. whose mistress Mussammat P. was and who was the lessee of her room, was tried jointly with S. L. and some other persons for offences under sections 48 and 53 of Act XII of 1896.

Held, that as there was no connecting link between the possession of cocaine by S. L. and that of Mussammat P., B. L. who was only concerned with the latter offence could not be tried jointly with S. L. and his conviction under section 48 of the Excise Act, would consequently have to be set aside.

I. L. R. 25 Mad. 61 (P. C.), referred to.

Held further, that in the absence of any proof that the possession of cocaine by Mussammat P. was on account of her protector B. L., the latter could not be held guilty of an offence under section 48 of the Act, although a permanent mistress might be regarded as a "wife" for the purposes of section 27 of the Penal Code.

Petition for revision of the order of M. H. Harrison, Esquire, Sessions Judge of the Delhi Division, dated the 10th day of May 1913.

Shadi Lal, for petitioner.

Government Advocate, for respondent.

The judgment of the learned Judge was as follows :—

13th Jan. 1914.

RATTIGAN, J.—Briefly stated, the facts that have been fully established by the evidence on the record are that the police received information that cocaine was being illicitly sold in a certain house in Delhi; that an organised raid was made upon the said house; that in one room a man named Sham Lal was found sitting on the floor with a pair of scales and a packet of cocaine (Exhibit P. 1) beside him; that subsequently other rooms in the house were searched, and that in one room, the door of which was locked but was opened with the aid of a key

(1) 1901 *I. L. R. 25 Mad. 61 (P. C.)* (*Subrahmania Ayyar v. King-Emperor*).

produced by Mussammat Phuldei, a widow, who occupied the room, more cocaine was found.

Fourteen persons in all were sent up for trial and it was apparently explained to them that they were accused of offences punishable under sections 48 and 53 of Act XII of 1896. Of these persons eleven were acquitted by the magistrate who tried the case, but three (*viz.* Sham Lal, Sukh Deo and Banwari Lal) were convicted under section 53 and sentenced, Sukh Deo and Banwari Lal each to 4 months' rigorous imprisonment and a fine of Rs. 1,000, and Sham Lal to 3 months' rigorous imprisonment and a fine of Rs. 500.

The judgment of the magistrate is not very clearly expressed and I find some difficulty in understanding why the only one of the 3 convicted persons who was actually found in possession of the drug has been awarded less punishment than the other two.

But it is, I think, obvious from the magistrate's judgment that Banwari Lal and Sukh Deo were convicted because the magistrate was satisfied that they occupied portions of the house and knew that cocaine was being sold (presumably by Sham Lal) in that house ;—in other words, that they abetted the sale by Sham Lal.

The three convicts appealed to the Sessions Judge and their appeals were rejected. Sham Lal and Sukh Deo have apparently accepted the decision of the Sessions Judge and served their terms of imprisonment and I am not now concerned with their case. Banwari Lal, however, has petitioned this Court on the revision side on the grounds that the joint trial of himself and the other accused persons was illegal, and that there is on the record no sufficient material to justify his conviction of any offence.

In my opinion, these contentions must prevail.

The magistrate convicted the petitioner under section 53 of the Act on the ground (as stated by the Sessions Judge) that he authorized and connived at the sale of cocaine in a house which was legally in his occupation. The Sessions Judge holds, and quite rightly, that this conviction cannot be upheld. The sale of cocaine, if it took place at all, was effected in a portion of the house which was separately rented by Sukh Deo, and there is nothing to shew that the petitioner was in any way connected with Sham Lal and Sukh Deo.

The mere fact that he was the lessee of another part of the house obviously is not sufficient to justify the inference

that he abetted these two persons in committing an offence under the Act. Admittedly he was not himself living in the house, and in point of fact there is good evidence to show that he was not even in Delhi when the raid took place. The Sessions Judge was, therefore, right in holding that the petitioner's conviction under section 53 of the Act was erroneous.

The learned Judge, however, finds that Mussammat Phuldei was the permanent mistress of the petitioner; that the locked room which she occupied and in which cocaine was found, was actually rented by him and that consequently Mussammat Phuldei's possession of the drug must under section 27, Indian Penal Code, be taken to be the possession of the petitioner. He accordingly altered the conviction to one under section 48 of the Act, but maintained the sentence.

The learned Judge justifies the course adopted by him by pointing out that the petitioner was informed at the beginning of the trial that he was accused of offences under both sections 48 and 53, and while admitting that upon this aspect of the case the joint trial of the petitioner and of Sham Lal and Sukh Deo was illegal, holds nevertheless that the petitioner who raised no objection to such joint trial in the Court of the Magistrate has in no sense been prejudiced thereby and that, therefore, the said trial can stand.

This view of the law is entirely erroneous and opposed to the very explicit ruling by their lordships of the Privy Council in the well-known case reported at page 61 of *I. L. R. 25 Mad. (1)*.

The only provision of law which would have justified the joint trial of petitioner and other accused persons is section 239 of the Criminal Procedure Code, which enacts that "when
" more persons than one are accused of the same offence, or of
" different offences committed in the same transaction, or when
" one person is accused of committing an offence and another
" of abetment of, or attempt to commit, such offence, they may
" be charged and tried together or separately, as the Court
" thinks fit."

Now, as I understand the proceedings in the Magistrate's Court, Banwari Lal was really tried for abetment of the offence committed by Sham Lal and Sukh Deo. In that event the trial of all three persons jointly would have been justified under section 239 of the Code, but as I have observed, and as

(1) (1901) *I. L. R. 25 Mad. 61 (P. C.)* (*Subrahmanya Ayyar v. King-Emperor.*)

the Sessions Judge himself concedes, Banwari Lal could not, upon the facts as found, have been convicted of such abetment.

If, however the Sessions Judge is right in assuming that Banwari Lal was tried for the offence (punishable under section 43 of Excise Act) of being in possession of cocaine found in the room occupied by his mistress, Mussammat Phuldei, then it is clear that the offence for which he was tried was entirely distinct from the offence committed by Sham Lal and Sukh Deo. Nor can it be urged that Mussammat Phuldei's possession of cocaine was committed in the same transaction in which the offence committed by Sham Lal and Sukh Deo was committed, for there is no connecting link between the two offences. It is possible, of course, that Mussammat Phuldei obtained cocaine from those persons, but of this there is on the record no proof and it is equally possible that she obtained the cocaine elsewhere.

Upon the evidence before me I must hold that the possession of cocaine by Mussammat Phuldei is a transaction entirely distinct from the transaction in respect of which Sukh Deo and Sham Lal were tried and convicted. She occupied a room quite separate from that in which the latter kept and sold cocaine, and her illicit possession of the drug had nothing to do with the illicit sale of the drug by those persons. On this ground alone I must accept this petition for revision and set aside the proceedings of the Courts below.

But I must go further and hold that upon the facts found, there is in law no justification for the conviction of the petitioner. Admittedly, he was not himself in actual possession or occupation of the room in which the drug was found. It was in the occupation of Mussammat Phuldei, and it was she who had the key of the door. There is, no doubt, evidence on the record to support the Sessions Judge's finding that this room was actually rented by the petitioner and that Mussammat Phuldei was his mistress. But while it may be admitted that a permanent mistress may be regarded as a "wife" for the purposes of section 27, Indian Penal Code, it would still be necessary to prove that the possession by the mistress was on account of her protector before it could be held that the latter was in possession of articles of which the actual physical possession was with the mistress. In the ordinary course of things when a man furnishes a house for his mistress' occupation he may reasonably be presumed to be in possession of all articles therein which can reasonably

be inferred to belong to him or to be in the possession of his mistress on his behalf.

But I cannot accept the proposition that this inference applies equally to articles of which the mistress is in possession illegally or contrary to the provisions of law. There is no *presumption* in such a case that she is in possession on behalf or on account, of her protector, and especially is this so when the article in question is such that the latter might well remain in ignorance that it was in his mistress' possession. To hold otherwise would be tantamount to holding that a man can always be convicted when his wife or his mistress commits a theft and has the stolen article in her possession.

The prosecution in cases of that kind must prove something more than that the article was found in the possession of the wife or mistress ; they must establish facts from which a Court is justified in presuming that such possession was on account of the husband or protector. That such must be the law is clear from the terms of the section and also from the fact that under those terms a clerk or servant is placed in the same position as a wife.

In the present case if Mussammat Phuldei had happened to be a mere care-taker charged with the duty of looking after the room rented but not occupied, by the petitioner, it would have been impossible to hold that her possession of cocaine was in law the possession of her employer unless some further facts had been proved from which it could reasonably be inferred that she was in possession not on her own account but on behalf of her master. The fact that she happens to be the mistress and not merely the servant of the petitioner does not, in my opinion, make any difference, when the article in question is one of which she might well have been in possession on her own account, or on account of any third person.

I accordingly accept this petition and setting aside the orders of the Court below, I acquit the petitioner. His bail bond is discharged and the fine, if paid, will be refunded.

Petition accepted.

No. 21.

Before Hon. Mr. Justice Scott-Smith.

CROWN

Versus

CHUNI AND BHURU—(ACCUSED).

Criminal Revision No. 2129 of 1913.

Criminal Procedure Code, 1898, section 110, (d)—obtaining decree by means of forged documents.

The two petitioners were bound down in security to be of good behaviour by the order of the District Magistrate. The evidence against them was that they manufactured forged bonds and obtained decrees by false and forged evidence.

Held that the obtaining of decrees by means of forged documents is neither cheating nor extortion as defined in the Penal Code and the order under section 110 of the Code of Criminal Procedure must therefore be set aside.

25 P. R. (Cr.) 1884 (1), and 28 P. R. (Cr.) 1900 (2), referred to.

Held also, that the two petitioners could not be tried together unless their association in the same offences was made out.

Case reported by A. H. Parker, Esquire, Sessions Judge, Hoshiarpur Division, with his No. 1698, dated the 3rd December 1913.

Nemo, for Crown.

Accused in person.

The facts of this case are as follows :—

Chuni and Bhuru are said to be habitual cheats and have been tried by the District Magistrate under section 110, Criminal Procedure Code.

The accused, on conviction by Lieutenant-Colonel C. P. Thompson, I. A., exercising the powers of a District Magistrate in the Kangra District, were sentenced, by order dated the 18th October 1913 under section 110 of the Criminal Procedure Code, to furnish bonds of Rs. 500 each with two sureties to be of good behaviour for three years, or in default to undergo three years' rigorous imprisonment.

The proceedings are forwarded for revision on the following grounds :—

The District Magistrate of Kangra has taken security for good behaviour from Chuni and Bhuru, money-lenders of Kathiari village, under section 110, Code of Criminal Procedure. It appears to me that he has done so because he believes that these persons habitually commit extortion or cheating.

(1) 25 P. R. (Cr.) 1884 (*Ganeshi v. Empress*).

(2) 28 P. R. (Cr.) 1900 (*Mahian Mal v. Empress*).

The evidence against them is that they manufacture forged bonds and obtain decrees by false and forged evidence.

These acts do not in my opinion constitute either extortion or cheating as defined in the Penal Code.

It is true that forgery and obtaining decrees by false evidence are frequently spoken of in English as 'cheating' and in vernacular *dagha*, but in strict legal parlance such offences do not constitute either cheating or extortion as defined in sections 415 and 390 of the Indian Penal Code.

I am of opinion that these words as used in section 110 (a) of the Criminal Procedure Code must be understood by the Courts to be as defined in the Penal Code.

It, therefore, appears to me that there is no evidence that these persons habitually commit cheating.

I, therefore, report the above result of my examination of this file to the Chief Court under section 438, Criminal Procedure Code, and recommend that the order requiring Chuni and Bhura to give security under section 110, Criminal Procedure Code, be set aside.

The order of the learned Judge was as follows :—

13th Feby. 1914.

SCOTT-SMITH, J.—I agree with the Sessions Judge that the obtaining of decrees by means of forged documents is neither cheating nor extortion as defined in the Penal Code.

In 25 P. R. (Cr.) 1884 (1), it was held that section 110, Criminal Procedure Code, did not apply to the case of a person who had the reputation of bringing false claims upon forged entries in account books.

In 28 P. R. (Cr.) 1900 (2) it was held that an habitual forger does not come within any of the classes of offenders specified in section 110, Criminal Procedure Code, from whom security may be demanded.

The above rulings are clear expositions of the law with which I agree.

I would also point out that the two petitioners could not be tried together unless their association in the same offences was made out.

I accept the revision and set aside the order of the District Magistrate calling upon Chuni and Bhura to furnish security, and discharge them.

Revision accepted.

(1) 25 P. R. (Cr.) 1884 (*Ganeshi v. Empress*).

(2) 28 P. R. (Cr.) 1900 (*Mahian Mal v. Empress*).

No. 22.

Before Hon. Mr. Justice Rattigan.

AHMAD GUL—PETITIONER.

Versus

CROWN—RESPONDENT.

Criminal Revision No. 107 of 1914.

*Criminal Procedure Code, 1898, section 514 and schedule V, form 10—
forfeiture of bond to keep the peace—attempt to poison a person.*

Held, that a bond to keep the peace cannot be forfeited under section 514 of the Code of Criminal Procedure except on proof of the commission of an offence involving a probable breach of the peace (*vide* form 10, schedule V) and consequently a conviction for theft, wrongful confinement, extortion, abduction of a woman or a secret attempt to poison a person (as in this case), not being offences which would “probably” result in a breach of peace, is not sufficient cause for forfeiture.

18 W. R. (Cr.) 63 (1), 19 W. R. (Cr.) 48 (2) and 7 P. R. (Cr.) 1906, referred to.

*Petition for revision of the order of G. C. Hilton, Esquire, District
Magistrate, Mianwali, dated the 23rd July 1913.*

Nurkhan, Agent, for petitioner.

Nemo, for respondent.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—The petitioner Ahmad Gul was directed, 21st March 1914, on the 4th of October 1912, to execute a bond, with one surety, in the sum of Rs. 200 to keep the peace for the period of one year. The bond is not on the record before me, but I presume that it was in accordance with form 10 of schedule V of the Criminal Procedure Code, and that under its terms the petitioner bound himself “not to commit a breach of the peace or do any act that might “probably occasion a breach of the peace during the said term” of one year.

On the 9th of October 1912, Ahmad Gul and one Muhammad were arrested on a charge of having attempted to poison a person named Ahmad Khan and under section 11 of the Frontier Crimes Regulation the Deputy Commissioner directed that the charge against them should be referred to a *jirga* for determination. A reference was accordingly made and the *jirga* found both persons guilty of the offence. The Deputy Commissioner, by order, dated the 8th December 1912, accepted the finding of the *jirga* and sentenced each of the accused persons to a term of seven years rigorous imprisonment

(1) (1872) 18 W. R. (Cr.) 63 (*HaranjChunder Roy*).

(2) (1873) 19 W. R. (Cr.) 48 (*Zearuddin Howladar*).

(3) 7 P. R. (Cr.) 1906 (*Muhammad v. Emperor*).

including three months' solitary confinement. The attempt to murder was by means of aconite poison administered in honey to the complainant by Muhammad at the instigation of Ahmad Gul.

On the 10th of May 1913, notice was issued by the Magistrate of the 1st class, Mianwali, to petitioner to show cause why his bond should not be forfeited, and, though it must have been known to the Magistrate that the petitioner was then in jail serving his sentence, his order states that petitioner has not filed any pleas, and has not even put in an appearance. The bond was, accordingly, forfeited and an appeal by petitioner to the District Magistrate was rejected.

The petitioner has now applied to this Court through his agent for revision of the orders of the lower Court, and, in my opinion, those orders cannot stand.

In the first place I find, on referring to the evidence of Ahmad Khan, complainant in the case before the *jirga*, that the attempt to poison him took place on the 17th or 18th *Asuj*, *Sambat* 1969, which I find corresponds to the 2nd or 3rd October 1912. Thus the offence was committed prior to the date on which the bond was executed and therefore not within the term of one year from its date.

Again, it has frequently been held that a bond to keep the peace cannot be forfeited except on proof of the commission of an offence involving a breach of the peace, and that the use of the word "probably" in form 10, schedule V of the Criminal Procedure Code, limits forfeiture to cases in which a breach of a peace is the "probable," and not merely the possible, result of the act of the person bound over.

Thus a conviction for theft or for wrongful confinement and extortion will not justify a forfeiture of such bond (18, *Weekly Reporter (Criminal)* 63, (1) and 19, *Weekly Reporter (Criminal)* 48 (2), nor will a conviction for the abduction of a woman (No. 7, *P. R. (Cr.)* 1906) (3).

In the present case a secret attempt to poison a person cannot reasonably be regarded as an offence which would probably result in a breach of the peace.

For these reasons I accept the petition and set aside the orders of the Magistrate and District Magistrate.

Revision accepted.

(1) (1872) 18 W. R. (Cr.) 63 (*Haran Chunder Roy*).

(2) (1873) 19 W. R. (Cr.) 48 (*Zearuddin Howladar*).

(3) 7 P. R. (Cr.) 1906 (*Muhammad v. Emperor*).

No. 23.

Before Hon. Mr. Justice Shadi Lal.

CROWN

Versus

CHIRAGH—ACCUSED.

Criminal Revision No. 1669 of 1913.

Workman's Liability Act, XIII of 1859, section 2—advances of stores, not money.

Held that section 2 of Act XIII of 1859, does not apply to advances in stores and not in money.

Case reported by Major A. A. Irvine, Sessions Judge, Lahore, with his No. 1306 of 15th September 1913.

Nemo, for accused.

Complainant, Todarmal, in person.

The facts of this case are as follows :—

It is alleged that complainant had been advancing various sums to accused at different times. When accused left complainant a sum of Rs. 93-4-0 was outstanding against the former who is said to have been employed by the latter as his *Jamadar*.

The accused, on conviction by Mr. L. A. Bull, exercising the powers of a Magistrate of the 1st class in the Lahore District, was ordered by order, dated 12th August 1913, under section 2, Act XIII of 1859, to repay to complainant the sum of Rs. 93-4-0.

The proceedings are forwarded for revision on the following grounds :—

The petitioner has been ordered under Act XIII of 1859 to repay a sum of Rs. 93-4-0 to the complainant.

It is argued that as complainant has no work in progress, following 28 Mad. 37, only a civil suit lies. The complainant, however, stated that work was only closed owing to the rains and desertion of workmen and would be re-opened shortly. A temporary stoppage of this nature does not appear to me to affect the case.

As regards ground 2 no receipt for Rs. 40 has been produced in the Lower Court and though I gave an adjournment until to-day for its production it is not forthcoming. Grounds 3 and 4 are general grounds on which nothing has been put forward.

With regard to the complainant's advances, however I find that on 28th March 1913 the petitioner received Rs. 116-8-3 in stores (the vernacular (calls it "flour, etc.") This is more than the sum for which he now claims (Rs. 93-4-0). Section 2 lays it down that when the workman has received "money." I question if stores are money within the meaning of the Act. The Chief Court has held that as the Act is of a penal nature its terms should be construed strictly. I therefore forward this revision.

The order of the learned Judge was as follows :—

8th May 1914.

SHADI LAL, J —The petitioner received Rs. 116-8-3 in stores and not in cash. It cannot, therefore, be said that he received "money" as required by section 2 of Act XIII of 1859. That section is, therefore, inapplicable and the conviction of the petitioner is illegal. I accept the recommendation of the learned Sessions Judge and set aside the order of the Magistrate, dated the 12th August 1913, convicting Chiragh.

Revision allowed.

No. 24.

*Before Hon. Mr. Justice Scott-Smith and Hon. Mr.
Justice Shadi Lal.*

KOHMI—(CONVICT)—APPELLANT,

Versus

CROWN—RESPONDENT.

Criminal Appeal No. 293 of 1914.

Indian Penal Code, sections 379, 412, 459 and 511—trespass in a building—whether cattle enclosure is a building—attempt to steal.

Accused was found guilty under section 457 of the Penal Code, of having committed lurking house trespass by night by entering the complainant's cattle enclosure with intent to commit theft of the cattle.

Held, that the cattle enclosure, which was merely a piece of ground enclosed on one side by a wall and on the other three sides by a thorn-hedge, was not a "building" within the meaning of section 412 of the Penal Code, and the conviction under section 457 was consequently bad.

57 P. R. (Cr.) 1887 (1), 28 P. R. (Cr.) 1905 (2) and 35 P. R. (Cr.) 1879 (F. B.) (3), referred to.

Held also, that the accused was guilty of the offence of an attempt to commit theft under section 311 and that the attempt began when entry was effected into the enclosure by making a hole in the hedge.

Sir James Stephen's Digest of Criminal Law, article 49, referred to.

*Appeal from the order of P. D. Agnew, Esquire, Sessions Judge,
Gujranwala Division, dated 21st January 1914.*

Radha Kishen, for appellant.

Government Advocate, for respondent.

The judgment of the Court was delivered by—

SCOTT-SMITH, J.—Kohmi has been convicted by the Sessions Judge of Gujranwala of an offence under section 457, Indian Penal Code, and in view of the fact that he has been convicted three times previously of offences under Chapter XVII of the Indian Penal Code, he has been sentenced to transportation for life. 4th May 1914.

The allegation of the prosecution is that the appellant committed lurking house trespass by night by entering the cattle enclosure of Bashkar with the intent to commit theft of his cattle.

The cattle-enclosure in question is not attached to any house, but is merely a piece of ground enclosed on one side by a wall and on the other three sides by a thorn-hedge.

(1) 57 P. R. (Cr.) 1887 (*Sacha Singh v. Empress*).

(2) 28 P. R. (Cr.) 1905 (*King-Empress v. Ramzan*).

(3) 35 P. R. (Cr.) 1879 (*F. B.*) (*Shera v. Empress*).

The first point raised by the appellant's counsel is that the cattle enclosure in question is not a building within the meaning of section 442, Indian Penal Code, *prima facie* we do not see how the mere surrounding of an open space of ground by a wall or a fence of any kind can be deemed to convert the open space into a building. It is certainly not a building as the term is usually understood, and we are supported by authorities in our view that it is not a building within the meaning of section 442.

In 57 P. R. 1887 (Criminal) (1) it was held that a cattlefold or pen with a thorn-hedge round it was not a building. This view was reaffirmed in 28 P. R. 1905 (Criminal) (2) in which the accused had entered the complainant's cattle pen to prosecute his intimacy with a young unmarried woman. In 35 P. R. 1879 (P. B.) (3) it was held that a courtyard consisting of a walled enclosure with 4 *kothas* or chambers opening into it, and an outer door or a gate leading into a side street, was a building. That case is very clearly distinguishable from the present.

The learned Government Advocate has not been able to quote any authority in support of the proposition that the cattle enclosure in question is a building. We, therefore, agree with the appellant's counsel that the conviction under section 457, Indian Penal Code, cannot be maintained.

On the merits we see no reason to disagree with the finding of the learned Sessions Judge that the appellant really did make his way into the cattle enclosure, entrance being effected by making a hole in the hedge, and we also have not the least doubt that his intention was to commit theft of the cattle. There are, no doubt, certain discrepancies in the evidence, but these have been discussed by the Sessions Judge and we agree with him that they are not material. The question then remains, of what offence is the appellant guilty?

His counsel suggests that the only offence of which he can be convicted is that of Criminal trespass under section 447 Indian Penal Code. The learned Government Advocate, on the other hand, urges that he should be convicted of the offence of attempting to commit theft under sections 379, Indian Penal Code. Appellant's counsel contends that at most his client had made preparation for committing theft, and that he had not as yet made any attempt to commit theft.

(1) 57 P. R. (Cr.) 1887 (*Sucha Singh v. Empress*).

(2) 28 P. R. (Cr.) 1905 (*King-Empress v. Ramzan*).

(3) 35 P. R. (Cr.) 1879 (P. B.) (*Shera v. Empress*).

The real difficulty in a case of this sort arises in determining, where the act passes from preparation into an indictable attempt.

Sir James Stephen in his Digest of Criminal Law, article 49, defines an attempt to commit a crime as "an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case."

Applying this definition to the present case we have no doubt that the attempt began when entry was effected into the enclosure by making a hole in the hedge. This was the first act which formed part of a series of acts which would have constituted an actual theft if appellant had not been interrupted.

We, therefore, hold that the appellant can be convicted of attempting to commit theft under sections $\frac{379}{311}$, Indian Penal Code. We, therefore, accept the appeal and, setting aside the conviction and sentence, convict appellant instead of an offence under the aforesaid sections and sentence him to $1\frac{1}{2}$ years' rigorous imprisonment, including 2 months' solitary confinement.

The fact that he has previously been convicted does not make him liable to enhanced punishment in the present case where he has only been convicted of an attempt to commit theft, and we have sentenced him to the maximum term of imprisonment prescribed for such an offence.

Appeal accepted.

No. 25.

Before Hon. Mr. Justice Scott-Smith.

MUHAMMAD SIRDAR—(CONVICT)—APPELLANT,

Versus

CROWN—RESPONDENT.

Criminal Appeal No. 271 of 1914.

Indian Penal Code, sections 24, 464, 466 and 477A.—unauthorised entries in Revenue Registers made by Patwari—without fraud or dishonesty.

The accused, a Patwari, made unauthorised entries in the *khatauni* *partal* book and *jamabandi*, shewing certain donees of land as *malikan qabza*, i.e., as proprietors of their holding merely without any share in the *shamilat*, whereas previously they were shewn as full proprietors. The deeds of gift made no mention of the *shamilat* and it was therefore a moot point whether

the gifts covered a share in the *shamilat* or not and *prima facie* the new entries made by the accused were correct.

Held, that as it could not be said that the accused (who acted apparently *bona fide*) made the entries with intent to defraud, or dishonestly, within the meaning of section 21 of the Penal Code, he did not make a false document as defined by section 461 nor fraudulently alter any book or register within the meaning of section 477A, and his conviction under sections 466-477 A, must accordingly be set aside.

Appeal from the order of T. P. Ellis, Esquire, Sessions Judge, Shalpur Division, at Sargodha, dated the 18th March 1914.

Fazal-i-Hussain and Devi Das, for appellant.

B. Bevan Petman, for respondent.

The judgment of the learned Judge was as follows :—

20th May 1914.

SCOTT-SMITH, J.—The appellant, Muhammad Sirdar, a patwari, has been convicted by the Sessions Judge of Shalpur of an offence under sections 466/477-A, Indian Penal Code, and has been sentenced to three months' rigorous imprisonment.

The offence of which appellant has been convicted is, to put it briefly, that he made unauthorised entries in the *khatauni partial* book and *jamabandi* in regard to the status of certain donees of land at Gunjial, namely, Khan Muhammad and Bahadur 'with intent to damage the donees and cause gain to the proprietors.'

The words in italics are those used by the Sessions Judge in his finding and it will be noticed that no intent to defraud or to cause *wrongful* gain or *wrongful* loss has been found in express words.

The effect of the entries made by the appellant was to show Khan Muhammad and Bahadur as *malikan qabza*, i.e., as proprietors of their holding merely without any share in the *shamilat*, whereas previously they were shown as full proprietors.

The deed under which these persons acquired their rights makes no mention of the *shamilat* and as the Sessions Judge remarks "it is a moot point of law as to whether a deed of gift not specifying the *shamilat* rights as going with the area gifted does or does not carry with it the rights in the *shamilat*."

Ordinarily the *onus* would lie upon a donee to prove that he was entitled to *shamilat* when the deed of gift is silent on the point, and apparently recognizing the justice of this the Revenue authorities have directed that in future cases of gift, a gift which does not specify the conveyance of *shamilat* rights shall be regarded as one without such rights and shall be so entered in the records.

It would therefore appear that the proper entry as regards the status of the donees in question should have been that they were *malikan qabza*. Upon this point Mr. Leigh, Settlement Officer, as P. W. 1, stated—

‘The entry of *malik qabza* may be a correct interpretation of the status of the proprietors, there has been no decision on that point. The essence of the accused’s offence is that he made an entry in the *jamabandi* altering the recorded status without any authority to do so.’

Ata-ul-Rahman, *girdawar*, P. W. 2, was the principal witness for the prosecution. He was present when the appellant made the entries complained of; his statement that appellant made them surreptitiously without his knowledge has been held by the Sessions Judge, and in my opinion, rightly, to be untrue.

As to what really took place the learned Judge relied upon the evidence of Fattah Khan, *lambardar*, P. W. 6, who stated that ‘while the accused and Ata-ul-Rahman were sitting together, the proprietors (*i.e.* co-sharers in the holding other than the donees) came to them with the deed of gift, that after accused had read the deed he pointed out to Ata-ul-Rahman that Khan Muhammad and Bahadur should be entered as *malikan qabza*, that the *girdawar* refused to make any alteration’ and then said to accused in effect, ‘If you want to make any alteration make it yourself’ which accused proceeded to do and then went away.

From this man’s evidence and from the report P. K. made by Ata-ul-Rahman to the Naib-Tahsildar, it is clear that there must have been many people present when this took place. There was a dispute as to the *status* of the donees and the *patwari* having regard to the deed of gift and to the Revenue rules was of opinion that they should be shown as *malikan qabza*; he wanted the *girdawar* to make an entry accordingly and when the latter refused to do so, he made it himself.

The above facts appear to me undoubtedly to suggest the inference that appellant made the entries in accordance with what he considered they ought to be and not with any intention to defraud, or to cause wrongful gain or loss to any one. Had his motive been dishonest or fraudulent he would hardly have made the entries openly and after a discussion with his superior officer as to what they should be.

The chief points relied upon by the Sessions Judge, as indicating a dishonest intention, are—

(1) the writing in the *partal* book of the words *malik qabza dari hain*;

(2) the making of the entry in the *jamabandi* in ink instead of pencil ;

(3) the Sessions Judge says the entry of the above words in the *partial* book was a mis-statement. This is so, if it was meant to refer to the previous entry in the *jamabandi*, but appellant probably meant it to refer to the entry as corrected by him. As regards the entry in the *jamabandi* being made in ink it must be remembered that appellant erased it very shortly afterwards, and his explanation of his conduct is possibly quite true.

He certainly acted in flagrant disregard of the Revenue rules, but I cannot see that these two points override the strong presumption of *bona fides* which, in my opinion, arise from the circumstances under which the entries were made.

The Settlement officer thought the punishment of dismissal would suffice for the appellant's infraction of the rules, and did not think it necessary to order a prosecution. It was only when a further charge of making away with the *jamabandi* was brought against him, a charge which the Sessions Judge finds was manufactured by Ata-ul-Rahman and of which appellant was acquitted, that a prosecution was ordered.

The assessors were unanimously of opinion that when appellant made the entries he had no intention of causing harm to any one and I have no hesitation in agreeing with them.

I have shown in the beginning of this judgment that there is no express finding by the Sessions Judge that appellant made the entries with intent to defraud, or dishonestly within the meaning of section 24, Indian Penal Code, in other words there is no finding that he made a false document as defined in section 464, or that he fraudulently altered any book or register within the meaning of section 477-A.

It is not shown that the making of the entries was likely to deprive the donees of any right to which they were entitled, the effect might merely have been to show correctly their status which was previously shown incorrectly. A correction of an entry in a Revenue record might prevent a person getting a share in the *shamilat*, but he could not be defrauded of something to which he had no right. A main ingredient of the offence therefore is wanting, and even on the Sessions Judge's findings I would hold that the conviction is unsustainable.

I accept the appeal and, setting aside the conviction and sentence, acquit appellant and discharge him from his bail.

Appeal accepted.

No. 26.

Before Hon. Mr. Justice Scott-Smith.

MIHAN SINGH AND OTHERS—(CONVICTS)—

PETITIONERS,

Versus

CROWN—RESPONDENT.

Criminal Revision No. 584 of 1914.

Indian Penal Code, section 149—members of a lawful assembly not liable for offence committed by one of them.

M. S. and his party were ploughing certain disputed land when the members of complainant's party came up to interfere with them and to turn them out. The Sessions Judge found that the latter were not justified in forcibly preventing the ploughing of M. S.'s party and that, on the other hand, M. S. was not justified in striking B. S. (one of complainant's party) on the head and thereby causing his death.

Held, that as the members of deceased's party were the aggressors, their object being to dispossess the other party from the land, M. S.'s party were perfectly justified in exercising their right of private defence and if M. S. exceeded that right, he, and he alone, was guilty of the offence and section 149 did not operate to make M. S.'s companions equally guilty with him, as they were not at the time members of an unlawful assembly.

Petition for revision of the order of P. D. Agnew, Esquire, Additional Sessions Judge, Lahore, dated the 14th February 1914.

Gobind Ram, for petitioners.

Nemo, for respondent.

The judgment of the learned Judge was as follows:—

SCOTT-SMITH, J.—There are three petitioners in this case, 5th June 1914.
Mihan Singh, Wir Singh and Nadir Singh. Mihan Singh has been convicted of culpable homicide under section 304, part II, Indian Penal Code, for causing the death of Bhola Singh by striking him on the head with a stick. The other two petitioners have been convicted of an offence under section 304, part II, read with section 149, Indian Penal Code.

I see no reason whatsoever to interfere with the findings on questions of fact of the learned Sessions Judge. His finding in regard to Mihan Singh is that he exceeded his right of private defence by striking Bhola Singh in the way he did.

I directed notice to issue only in regard to Wir Singh and Nadir Singh, for, accepting the findings of the learned Sessions Judge, it appeared to me that they could not legally be convicted of any offence.

The Sessions Judge found that Mihan Singh and his party were ploughing the disputed field when the members of the complainant's party came up to interfere with them and to turn them out.

In his judgment the Sessions Judge says that they, *i.e.*, the complainant's party, were not justified in forcibly preventing the ploughing of Mihan Singh and others, on the other hand neither was Mihan Singh, appellant, justified in striking Bhola Singh on the head. Further on in the judgment he says, "The evidence clearly shows that all these six persons and "Aror Singh, who has absconded, were gathered together "with a common object: and though they may have been "acting in the right of private defence of their possession of "the disputed land, there can be no question but that Mihan "Singh at least far exceeded that right of private defence. "He and the others of the appellants are, therefore, guilty of "whatever offence was committed by Mihan Singh."

Now, from these findings it does not appear that Mihan Singh and his party constituted an unlawful assembly. There is no finding that their common object was any of those specified in section 141 of the Indian Penal Code. On the contrary, the Sessions Judge finds that the members of deceased's party were the aggressors, their object being to forcibly dispossess the other party of certain land.

Mihan Singh and his party were, therefore, perfectly justified in exercising their right of private defence and if Mihan Singh exceeded that right, he, and he alone, is guilty of any offence.

Section 149 does not operate to make Mihan Singh's companions equally guilty with him as they were not at the time members of an unlawful assembly.

Accepting, then, as I do, the findings of the learned Sessions Judge, I accept the revision so far as Wir Singh and Nadir Singh are concerned, and, setting aside their convictions and sentences, acquit them and discharge them from their bail.

The petition of Mihan Singh is rejected.

Revision accepted.

Full Bench.

No. 27.

Before Hon. Sir Alfred Kensington, Kt., Chief Judge, Hon. Mr. Justice Johnstone and Hon. Mr. Justice Battigan.

GHULAM KADIR KHAN—APPLICANT,

Versus

CROWN—RESPONDENT.

Criminal Miscellaneous No 37 of 1914.

Indian Press Act, I of 1910, sections 4 (c), 17 and 20—application to Chief Court to set aside order of forfeiture—whether “Local Government” is included in term “Government”—General Clauses Act, X of 1887, section 3 (21) and (29)—expressions of professed loyalty on other occasions—no excuse.

Held, following 14 P. R. (Cr.) 1913 (F. B.) (1, that the term “Government established by law in British India” as used in section 4 of the Press Act, includes a Local Government.

Held also, that the Court was not concerned with the motives for writing the articles in question. The point to be decided was, whether the articles were likely to bring Government into hatred or contempt or to excite hatred or contempt against the Christian subjects of His Majesty in India.

Held further, that no amount of professed loyalty on other occasions could be taken as nullifying the probable effects of the writing contained in the articles concerned and that the applicant had entirely failed to prove that Government had established no case for forfeiture.

In the matter of forfeiture of security of “The Zamindar Printing Press,” Lahore. Application under section 17, Indian Press Act, 1910, to set aside the order of forfeiture.

Fazal-i-Hussain, Manohar Lal, Badr-ud-Din, and Shuja-ud-Din, for appellant.

Government Advocate and Sheo Narain, for respondent.

The judgment of the Court was delivered by—

SIR ALFRED KENSINGTON, C. J.—This is an application under 20th June 1914, section 17 of the Indian Press Act, I of 1910, to set aside an order passed by the Punjab Government on the 15th September 1913 against the applicant Ghulam Qadir Khan, Keeper of the *Zamindar Printing Press*, declaring the security of Rs. 2,000 deposited in respect of the said Press to be forfeited under section 4 (1) of the Act in consequence of objectionable matter contained in four specified articles of the *Zamindar Newspaper* (daily edition). It is unnecessary to recite the order in full as both it and the articles in question have been printed in the paper-book.

This particular order of Government has not presented much difficulty to us and after hearing Counsel for the applicant at great length we did not think it necessary to call on the learned Government Advocate for reply. The forfeiture led, however, to much more serious measures shortly afterwards, to be stated in our separate judgment, and it will be convenient here to give a short history of the *Zamindar Press*.

We are informed that the original owner of the *Zamindar Newspaper* was a brother of the applicant, named Siraj-ud-Din Khan, by whom the newspaper was published in the Gujranwala District from about 1903 for circulation primarily among the agricultural community in matters affecting them. On the death of Siraj-ud-Din in 1909 his son, Zafar Ali Khan, a gentleman educated at Aligarh College and a graduate of the Allahabad University, became the Editor and the principal proprietor of the paper. We are also told that Zafar Ali Khan had been employed in the Hyderabad State for about twelve years from 1897 and holds a pension from that State of Rs. 125 a month, and that he is now aged about forty or forty-two, so that he is a man of education, experience, and presumably of such mature judgment that he should be treated as thoroughly responsible for the conduct of the paper. There may be other proprietors but he was admittedly the leading spirit of the enterprise, with the active assistance of his uncle, the present applicant.

In 1910, Lahore was selected as the place for publication of the paper and it was at first printed there by an independent press. The character of the paper changed so as to make it appeal more directly to the educated classes of the Muhammadan community, with a much larger circulation, and in consequence of the attitude taken by the Editor or Editors, security to the amount of Rs. 2,000 was required. We need not go into detail on all this, and it is sufficient to note that in October 1912 the proprietors started publication from a steam press of their own, making the necessary declaration about that time. We are told that shortly afterwards Zafar Ali Khan left for England in about November 1912, returning on the 3rd August 1913. These various dates may not be precisely accurate, but they are sufficient to make the position clear. It is understood that Zafar Ali Khan retained control of the paper during his absence under the direct management of his uncle, Ghulam Qadir Khan, who is the declared Keeper of the Press.

The issues of the paper now in question are those of the 29th July 1913, the 26th August 1913 (two articles), and the 28th August 1913.

In respect of the first and of one of the articles of the 26th August, Government have alleged in terms of section 4 (!) (c) of the Act that they were likely to bring into hatred and contempt the Government established by law in British India, in particular the Local Government of the United Provinces, and to excite disaffection towards the said Government.

In respect of the second article of the 26th August, there is the same allegation limited to contempt as regards Government and especially the Government of the United Provinces, with a further charge that the article was likely to bring into hatred the Christian subjects of His Majesty in British India.

In respect of the article of the 28th August, the allegation is that it was likely to bring Government into contempt, without specification of the Local Government of the United Provinces, and further to bring into contempt the Christian subjects of His Majesty in British India.

The application now before us challenges these contentions of Government on numerous grounds which may be summarised under the following heads :—

- (1) Grounds 1 to 14 assert that the *Zamindar* is in general a strong advocate of loyalty and good will to the British Government, that there is nothing specially objectionable in these particular articles, and (following the line of Counsel's argument) that where the language used in these articles is too highly coloured, allowance should be made for journalistic exaggeration, especially in view of the objects with which the articles were written.
- (2) Grounds 15 to 20 and 22 and 23 seek to establish certain technical defects in the procedure of Government, which have been scarcely touched upon in argument, and may for the most part be taken to have been given up.
- (3) Grounds 21 and 24 practically amount to an appeal *ad misericordiam* and apply more particularly to the separate order of forfeiture to be dealt with in our second judgment.

In our opinion, Counsel for the applicant has entirely failed to establish his main contention of the harmless nature of all these articles, and more particularly so in respect of the article of the 29th July 1913 and the first of the two articles of the 26th August, in which there are numerous expressions which can,

we think, only be interpreted as deliberately intending to bring Government, and especially the Local Government of the United Provinces, into hatred and contempt.

We do not propose to advertise the paper by quoting objectionable expressions in great detail. It is enough to explain that at the time when the article of the 29th July 1913 was published, violent agitation was going on in the Vernacular Press generally, of a certain class, with the object of inflaming popular passion with reference to an incident in connection with a mosque at Cawnpore. The *Zamindar* undoubtedly shared responsibility with other papers for promoting the agitation, but it is significant that the article in question was published only a very few days before the well-known outbreak in Cawnpore on the 3rd August 1913, which resulted in very serious consequences. The article of the 29th July was well calculated to further inflame popular passion by asserting that Government had entered on a career for demolition of mosques, and indeed by saying that "the mosque-breaking Lieutenant-Governor of the United Provinces" was shortly coming to Agra, adding "let us see the turn of which mosque comes next." The text upon which this article was written was an alleged further grievance about a small mosque in Agra, as to which it is now freely admitted, both that Government had nothing to do with the affair, and that the incident was eventually settled to the satisfaction of the Muslim community. There was not the smallest foundation for the deliberate assertion that Government had entered on a policy of mosque-destruction, and in view of the highly excited feelings which were being roused at the time it is to our minds impossible to believe that the Editor published this article in good faith.

The first of the articles of the 26th August, published some three weeks after the Cawnpore riot, is very long and discursive. It again made various most offensive references to the Lieutenant-Governor of the United Provinces in respect of incidents at both Cawnpore and Lucknow, describing in highly coloured language violent despotic action taken by the Local Government in Lucknow, which was styled as more ruinous to the honour of law and more palpably insulting to public liberty than any which had been ever heard of except in that City of tyranny, Cawnpore (misprinted as Lucknow on page 6 of the paper book). Further on there were insulting suggestions that the Lieutenant-Governor had missed his vocation and would have been in his proper place in the darkest ages of the world, as President of the Inquisition or Despotic Ruler of a Tartar Capital,

and that he had arrogated to himself the right to decide on matters of religion.

The only excuse given for the violent language used throughout this article is that a measure taken by the Lieutenant-Governor in Lucknow was likely to prevent the raising of subscriptions for the defence or assistance of the sufferers in the Cawnpore riot. Here again, we consider that the whole tone of the article and the nature of the allegations made went much beyond any legitimate comment on the action of Government and was directly intended to bring Government into hatred and contempt.

We here notice a technical plea that a Local Government cannot be taken as included in the terms "Government established by law in British India." Having regard to the definitions of "Government" and "Local Government" contained in section 3 (21) and (29) of the General Clauses Act, X of 1897, we see no force in this plea, which has further been disallowed by a Full Bench of this Court in the ruling published as 14 *P. R.* 1913 (*Cr.*) (1). It is not open to the present Full Bench to reconsider the matter without reference to a Full Court, and we do not think that there can be such doubt as to the correctness of the previous finding as would justify us in making the reference. We disallow the contention.

On our finding as to the intention and effect of the two articles already discussed we are quite unable to hold that the Local Government of the Punjab has acted improperly in directing forfeiture of the Rs. 2,000 security of the *Zamindar Press*. It therefore becomes of less importance that we should minutely consider the further articles of the 26th and the 28th August 1913.

It is enough to say that the first of these articles made the circumstances under which Turkey had been fighting in both Tripoli and the Balkans, in conjunction with what was happening in India, the text for highly coloured representations of the antagonism between Christians and Muhammadans, while the second attributed to Government disgraceful motives for prohibiting the circulation in India of a pamphlet published in Constantinople under the title of "Come over into Macedonia and help us." As regards the former there were fresh references to what had previously (page 4 of the paper book) been described as the action of officials who are not unlikely to have lost their

self-control and to have unhesitatingly ordered a general massacre on the 3rd August at Cawnpore, while as regards the latter, the Editor of the *Zamindar* must have been well aware that the question of suppression of the pamphlet referred to was at the time *sub judice* in the High Court of Calcutta (see XVIII Cal. Weekly Notes, pages 1 to 22).

Whatever the ostensible motives for these two articles may have been, we must recognise that their effect would be to excite either hatred or contempt against the Christian subjects of His Majesty in British India, and we are concerned, not with motives but with results. We cannot therefore say that Government misapplied the Press Act in respect of these further articles, though standing by themselves alone they might be held less objectionable than the two articles previously discussed.

In support of the applicant Counsel has under section 20 of the Act produced a number of extracts or abstracts from previous issues of the *Zamindar* with the object of showing that the paper is in general a strong supporter of the British Government. These extracts have been separately printed as a supplementary paper-book. The learned Government Advocate was prepared with a number of extracts from other issues of the paper to indicate that plausible professions of loyalty were inconsistent with the general tone taken up on other occasions, but after some discussion it was finally decided that the argument should not be prolonged by putting these further extracts in evidence so as to give opportunity for discussion of what is for the most part an irrelevant matter.

Our answer to Counsel on this point is that no amount of professed loyalty on other occasions can be taken as nullifying the probable effects of the violent writing contained in the particular articles now dealt with. The Order of forfeiture must stand or fall by the terms of these particular articles, and in our opinion the applicant has entirely failed to prove that Government had established no case for forfeiture. The history of the case indicates sufficiently that the Editor of the *Zamindar* had received previous warnings.

We can see no reason for interference under section 19 of the Act and we accordingly reject this application. We make no order as to costs.

Application rejected.

Full Bench.**No. 28.**

*Before Hon. Sir Alfred Kensington, Kt., Chief Judge, Hon.
Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.*

GHULAM KADIR KHAN—APPLICANT,

Versus

CROWN—RESPONDENT.

Criminal Miscellaneous Application No. 38 of 1914.

Indian Press Act, I of 1910, sections 4 (c), 17, 19 and 20—Court cannot reduce the penalty inflicted by the Local Government.

Held, that it had not been shown that the Government order was wrong on the merits.

Held further, that the Court had no authority under section 19 to reduce the penalty, without setting aside the order of forfeiture.

In the matter of, forfeiture of security of "The Zamindar Printing Press," Lahore, and also forfeiture of the Press. Application under section 17, Indian Press Act, 1910, to set aside the order of forfeiture.

Fazal-i-Hussain, Manohar Lal, Badr-ud-Din, and Shuja-ud-Din, for appellant.

Government Advocate, for respondent.

The orders of the learned Judges were as follows:—

SIR ALFRED KENSINGTON, C. J.—This is a further application *20th June 1914*, under section 17 of the Indian Press Act in respect of orders issued by the Local Government of the Punjab on the 12th January 1914, declaring forfeiture of Rs. 10,000 deposited as security of the *Zamindar* Printing Press, and also of the Press itself, which is said to be worth from ten to fifteen thousand rupees. Our judgment in the connected case* dealing with an earlier order of forfeiture of Rs. 2,000 security has given the previous history of the matter. Shortly after the first order of forfeiture a fresh declaration was made under section 5 of the Act, on deposit of security for Rs. 10,000 on the 4th October 1913. It is in consequence of three subsequent articles in the *Zamindar* (daily edition) of the 19th, 20th and 21st November 1913 that this security has been forfeited, together with the Press, under section 6 (a) and (b) of the Act. The applicant is Ghulam Kadir Khan, Keeper of the Press.

It must be explained that after returning to India on the 3rd August 1913 the applicant's nephew Zafar Ali Khan left again for England in September, and it is understood that he

**Vide p. 77 supra.*

is still residing there. The three articles now in question were admittedly written by Zafar Ali Khan who has accepted full responsibility for himself in a pamphlet before us bearing date 10th February 1914, styled "The Indian Press Act," which appears to have been circulated by him as an appeal to Members of the House of Commons. In this pamphlet Zafar Ali Khan has given his own translation of the articles, for the most part fairly enough, and has challenged the right of Government to take drastic measures against the *Zamindar* in respect thereof. We note that in the concluding paragraph of this pamphlet he has represented himself as having no legal remedy in India.

The order of Government specifies that the articles of the 19th and 20th November 1913 are likely to bring into hatred and contempt the Government established by law in British India, and to excite di-affection towards the said Government, while as regards the article of the 21st November the allegation is that it is likely to bring into hatred and contempt the English subjects of His Majesty in British India.

The grounds of the application before us challenge these contentions on the merits of the articles ; allege as before that the *Zamindar* has acted in good faith and has in general been conducted with propriety ; assert that there are certain technical objections (not pressed in argument) to the order of forfeiture ; and lastly pray that the penalty is in any case altogether excessive and should be reduced.

It is impossible for us in considering these three particular articles to shut our eyes altogether to all that has been said in our judgment on the connected case No. 37.* We may readily admit that in the articles now in question the language used by the writer is of a less violent and intemperate description, but after hearing the reply of the learned Government Advocate we are satisfied that the whole tone of these articles also is of the nature ascribed to them by the Punjab Government.

The first of these articles has been written under the guise of a feeling for the Muhammaadan religion. The second deals with a personal grievance regarding the refusal of the Prime Minister of England and the Secretary of State for India to grant an interview to Zafar Ali Khan and others, asked for by them as prominent members of what is styled "The All-India Muslim League." The third article professes to call attention to certain unpleasant features in the social life of England and subsequently makes general comments on the English Press.

I propose to deal very shortly with each of these articles.

In the first, dated the 19th November, there is a plausible representation that it is a great sin to express distrust regarding the Government, but practically the whole of the article is taken up with suggestions that there is the gravest reason for distrusting the attitude of Government in certain matters of religion. It is further alleged that the Government in India has taken sides with the Hindu community as against the Musalmans, and it is insinuated that the latter community has been trampled upon by the Government with the deliberate object of setting class against class. If I rightly understand this article there is a further insinuation that this attitude has been taken up by Government as a measure of repression of the Musalman community in consequence of what took place at Cawnpore in August last.

As regards the second article of the 20th November we do not know very clearly the precise objects with which Mr. Zafar Ali Khan and two other members of the All-India Muslim League desired to approach the highest authorities in England. So far as Counsel was able to enlighten us the League may consist of a thousand or perhaps more members, and it is understood that there were at the time certain differences of opinion between this League and a branch constituted in England under the presidency of a very experienced and distinguished Muhammadan gentleman. The reply to the request made by Zafar Ali Khan and others for an interview was contained in a letter from the Secretary of State for India, saying that after careful consideration it had been decided that no public advantage would accrue from the interview asked for in view of differences of opinion held by different sections of the Muhammadan community, and that the request could not be acceded to. Taking this refusal as its text the article proceeds to bewail the misfortune of subjects and the ill-fate of the country whose destinies have been placed in the hands of such indifferent authorities and vested in such self-willed Ministers.

We have no reason for supposing that the League in question represents anybody beyond its own members, but the article goes on to comment on the contempt shown for the feelings of seventy millions of Indian Musalmans; to lament that the reins of Government have fallen into the hands of persons who consider it a disgrace and beneath their dignity to listen to the representatives of the subjects of the British Crown; to make various comments indicating that this is all of a piece with the errors into which the Local and Supreme Governments have fallen in India; and finally to urge that the

reply given in England has rebuffed the whole Musalman community *with hatred and contempt*

We note that the words in italics have been judiciously omitted from the translation of this article contained in Mr. Zafar Ali Khan's pamphlet (page 16) but after referring to the original we find that there is no mistake, the vernacular words used being *nafrat wa haqirat*.

The third article of 21st November has been represented as being merely an amusing account of the impressions of a new comer in a strange country ; but I find it difficult to accept this explanation. The matters referred to in the social life of England are not those which would immediately strike a new comer, and in point of fact Zafar Ali Khan was not at the time making his first visit to England. He seems to have gone out of his way to draw pointed attention to certain social condition with a view to emphasizing his contention that a country where such institutions existed is not fit to have the control of Government in India.

It is unnecessary to draw more pointed attention to the passages in question, which include an allegation that England has become largely poisoned by a particular class of disease. The remainder of this article being taken up with discussion of the English Press is perhaps of less importance, but the contention is that the Press has been taught to follow the principle that India is the meanest part of the dependencies of England and to be governed only by suppressing its voice.

The explanation given by Counsel of these articles is: that the first was *bona fide* intended to facilitate a settlement of differences between the Hindu and Musalman communities on the basis of compromise ; that the second was intended to work up an agitation in India with a view to recognition of Zafar Ali Khan and his associates in England in order that a number of telegrams should be sent to the Secretary of State from every part of the country to the effect that refusal to grant an interview to Members of the (so-called) Muhammadan deputation had injured the feelings of seventy million Musalmans and could not be viewed with patience and forbearance ; and that the third was simply an amusing article intended to improve the circulation of the *Zamindar* Newspaper. It is admitted that the language used was exaggerated and sometimes very highly coloured, but it is urged that all journalists must exaggerate if they are to have any effect, and that reasonable

allowance should be made for what is described as bad judgment and bad taste.

I think it is impossible to accept these explanations as sufficient. The result of writings such as those in question in vernacular newspapers in India is not to allay excitement but to stir up fresh trouble. It is difficult to believe that the Editor was not perfectly well aware of this, and that he has not recklessly published wildly written articles of the kind with that intention, but we are not really concerned with his intentions.

The question before us is, whether Government is fairly entitled to take exception to writing of the kind in view of the results which are likely to follow in India from violent agitation in the Vernacular Press. It appears to me impossible to say that the Local Government, with which the responsibility rests for determining how far real danger arises from articles of the kind, has acted wrongly in taking these articles as a ground for again issuing orders of forfeiture. As in the connected case expressions of loyalty used by the *Zamindar* in previous issues of the paper are not really relevant as an excuse, but it will be noticed that the greater part of the extracts published in the supplementary paper-book deal with articles of much earlier date, and that the gravity of the charge against the paper rests in the fact that in spite of warnings its tone has been becoming gradually more and more violent and objectionable.

It follows that, in my opinion, and I believe it is shared by my learned colleagues, the present order of forfeiture is not one which the Chief Court should set aside under section 19 of the Act.

The only other point to be noticed is, what may be called the appeal *ad misericordiam*. It is contended that section 19 gives the Chief Court authority to determine whether the order of forfeiture is excessive or not, and to reduce it at discretion.

We are not aware that this contention has ever been raised before or discussed by the High Courts, and the learned Government Advocate has argued that it cannot be supported by the terms of section 19 of the Act. We think that this contention of the Government Advocate is correct. The terms of section 19 are very explicit and it is not in our power to read into them anything more than the Act says. We have no jurisdiction to deal with this application as if we were a Criminal Court of Revision considering the nature of a sentence. We are by an Act given certain extraordinary powers of interference, but these

powers are strictly limited. We are authorised by Statute to set aside an order of forfeiture but not to make any other change. In this construction of our powers it is not open to us, even if we should desire to do so, to do anything more than either reject the application or set aside the order of forfeiture as a whole. We can make no discrimination between the forfeiture of security and the additional forfeiture of the Press which is permitted by the terms of section 6.

Under these circumstances it is no part of our duty to consider whether the pecuniary penalty involved in the orders of forfeiture is or is not excessive, and we decline to express any opinion upon the point.

The conclusion at which I have arrived is that the Chief Court should not set aside the order of forfeiture as a whole and that this application should be dismissed. I would make no order as to costs.

20th June 1914.

JOHNSTONE, J.—After reading the above judgment I find myself in entire agreement with it. In my opinion the facts fully justify the forfeitures and I agree that this Court has no power to reduce, even if it wished to do so, the extent of the forfeitures.

23rd June 1914.

RATTIGAN, J.—I agree with the Chief Judge, and accept his judgment in its entirety. There are, however, one or two remarks which I would like to add.

The Chief Judge has stated that we are not here concerned with the intentions or motives of the writer of the articles under review and that we have merely to look to the results likely to ensue from the publication of those articles. I quite agree, but as Mr. Fazl-i Hussain, applicant's Counsel, laid great stress upon his client's loyalty to the Emperor and to the British Government of India, I think it right to add, in order to avoid any misapprehension on this point, that the learned Counsel failed to satisfy me that, despite his misguided methods and unfortunate use of strong language, the real intention of the writer of those articles was to act the part of a candid but honest friend of British rule in this country.

Explanation II of section 4 of the Indian Press Act, 1910, expressly provides that "comments expressing disapproval of the measures of Government . . . with a view to obtain their alteration by lawful means, or of the administrative and other action of the Government . . . or of the administration of justice in British India, without exciting or attempting to excite

"hatred, contempt or disaffection, do not come within the scope "of clause (c)" and no objection can, or should, be taken to criticism of Government's measures or actions, if such criticism is couched in proper language and cannot reasonably be construed as likely to excite hatred, contempt or disaffection.

But *Explanation II* cannot, and was not intended to, cover cases where the obvious intention of the "words, signs or visible representations" (to use the phraseology of section 4 of the Act) is to embitter one class of His Majesty's subjects against the Government.

I have no desire to advertise the articles under impeachment by quoting largely from them and I therefore refrain from setting out extracts *in extenso*. But when the writer of the articles, "*Sacrifice in Ajudhia*" and "*A Political Blunder*," tells his Muhammadan readers that "Hindus are being patted on the back while Muhammadans are being deprived by force of their legitimate rights;" that Government when appealed to, refuses to intervene and itself 'tramples' upon those rights; that the Secretary of State for India "does not care one bit for the feelings of seven crores of Indian Musalmans;" that "the reins of the Government of Great Britain have fallen into the hands of persons who consider it a disgrace and beneath their dignity to talk and listen to the representatives of the subjects of the Crown," and that "the Lieutenant-Governor" (of the United Provinces of Agra and Oudh) "and the Governor-General have fallen into the same mistake," I find it difficult to follow the argument that the writer was expressing his views, possibly in "bad taste" and admittedly with unjustifiable hyperbole, but yet as an honest and loyal subject, who had no ulterior motives and whose sole object was to raise subscriptions or to obtain memorials to the Secretary of State.

If language means anything, and if a writer's intentions are to be gathered from the words used by him in his articles and not from protestations of loyalty previously or subsequently made by him, the intention of the author of the articles to which I have referred, must clearly have been to excite resentment on the part of Indian Muhammadans against a Government which he represents as deliberately trampling upon their rights in order to ingratiate Hindus, and through its responsible members treating the Muhammadan community and its representatives "with hatred and contempt," (*nafrat wa haqarat*).

Application rejected.

Full Bench.

No. 29.

Before Hon. Sir Alfred Kensington, Chief Judge, Hon. Mr.
Justice Johnstone and Hon. Mr. Justice Rattigan.

IIASTA AND OTHERS—(CONVICTS)—PETITIONERS,

Versus

CROWN—RESPONDENT.

Criminal Revision No. 189 of 1914.

Criminal Procedure Code, 1898, sections 227, 251, 255, 367 (1) and 403, (1)—whether Court has power to alter the charge after case has been compounded.

Held, that where a Court has drawn up a charge of an offence compoundable without sanction of Court and this charge, having been read and explained to the accused, has been pleaded to, that Court should, upon the presentation to it of a petition of composition by the person mentioned in the last column in the table in section 345, Criminal Procedure Code, at once accept the position and acquit the accused and has no power to alter the charge already drawn up.

3 Cal. W. N. 322 (1), 3 Cal. W. N. 518 (2), 1 L. R., 29 Cal. 726 (F. B.) (3), referred to.

4 Bom. L. R. 718 (4) and 11 P. R. Cr., 1907 (5) distinguished.

Petition for revision of the order of A. H. Brasher, Esquire, Additional Sessions Judge, Shahpur Division, at Lyallpur, dated the 12th day of January 1914.

Badr-ud Din, for petitioners.

Herbert, for respondent.

The judgment of the Court was delivered by—

2nd July 1914.

JOHNSTONE, J.—This case has been referred to a Full Bench as it appeared to require careful treatment and an authoritative decision. The facts are simple in so far as they affect the question referred, and they may be stated thus. On 20th November 1913, seven accused persons being before the Magistrate, he heard evidence and drew up against them charges under section 417 and section 312, Indian Penal Code; the offences punishable under these sections being compoundable. Accused were called upon to plead and pleaded not guilty. The case was adjourned for further cross-examination of the prosecution witnesses and was still pending when, on 3rd Decem-

(1) (1899) 3 Cal. W. N. 322 (*Kusum Bewa v. Bechu Bewa*).

(2) (1899) 3 Cal. W. N. 518 (*Mahomed Ismail v. Faiz-ud-din*).

(3) (1902) 1 L. R. 29 Cal. 726 (F. B.) (*Mir Ahmad Hossein v. Mahomed Askari*).

(4) (1902) 4 Bom. L. R. 718 (*Emperor v. Asmat Hasan*).

(5) 11 P. R. (Cr.) 1907 (*King-Emperor v. Hira Singh*).

ber 1913, complainant put in a *razinama*. The case was adjourned to 4th December, on which day complainant was examined, and the 16th December was fixed "for argument." On that day the Court recorded an order that the charges should have been under section 147, Indian Penal Code. They were therefore altered accordingly; and, the offence of rioting not being compoundable, sanction to the *razinama* was refused, and in the end the Magistrate convicted all the accused persons and sentenced each to 9 months' rigorous imprisonment.

In appeal to the Sessions Court the point was taken, *inter alia*, that, the complainant having filed a *razinama*, the accused should have been acquitted, the proceedings following the presentation of that document being null and void. This plea the learned Additional Sessions Judge rejected on the strength of a case in which similar procedure had been followed by a Magistrate and approved by the Sessions Judge, the conviction being finally upheld by the Chief Court.

In connection with this, we would remark that that case came up here on revision, and that the Judge who dealt with it expressed no definite opinion on the correctness of the procedure, but declined to interfere, apparently because he thought substantial justice had been done. In the present instance it does not appear that there are any special reasons for declining to interfere, and the point is one of importance.

We have heard Mr. Herbert in support of the Lower Court's view and Mr. Kureshi against it.

The way we look at the matter is this. Under section 345 (1), Criminal Procedure Code, offences punishable under section 447 and section 342, Indian Penal Code, may be compounded by the person in possession of the property trespassed upon and the person confined, respectively, under both of which descriptions it is not denied that the present complainant comes. Then Sub-section (6) says that "the composition of an offence under this section shall have the effect of an acquittal of the accused." Further, sub-sections (1) and (2) shew that, while the sanction of the Court is required to composition of offences falling under certain sections, and while sanction is required in the peculiar circumstances mentioned in sub-section (5), no such sanction is required when the offence comes under section 447 or section 342 and the case is still under trial in the Court of first instance. Then see sections 254 and 255, Criminal Procedure Code, when the charge has been drawn up and read and explained to the accused and he has pleaded, the "inquiry" becomes a "trial."

But the law says, as we have seen, that a composition under section 345, Criminal Procedure Code, shall have the effect of an acquittal; and we are of opinion that the composition is complete immediately complainant puts it forward in Court: *cf.* 3, C. W. N., 322 (1), in which it was held that a petition of composition once put in cannot be withdrawn.

In short, when the petition of composition is put in, the case is at an end, and the Court's sole remaining duty and sole remaining function is to record a formal order of acquittal and to set the accused person at liberty. It should at once proceed to do so, it being obligatory on it to accept the compromise and to give effect to it—see *dictum* to this effect in 3, C. W. N., 322 (1), already quoted, and in 3, C. W. N., 548 (2). We do not think at such a stage it can sit down and consider whether the charge, itself as drawn, was appropriate or not, much less proceed to alter that charge and go on with a case, which has wholly passed out of its hands.

Mr. Herbert, adverting to section 227, Criminal Procedure Code, suggests that the Court could under that section alter the charge "at any time before judgment is pronounced," and therefore still had power to do so in the present case notwithstanding the petition of composition.

For two reasons, we are inclined to withhold our assent to this suggestion. In the first place, apart from the technical meaning of the word "judgment," it is hardly correct to allow a Court, by a too liberal interpretation of section 227 aforesaid, to go behind what the law has pronounced *equivalent to an acquittal* and to retry a case already ended. Section 403 (1) of the Code, in our opinion, prevents a retrial, even on a different charge, of the same persons on the same facts after an acquittal still in force. Secondly, it is more than doubtful whether the final order of acquittal on a petition of composition is a "judgment" *Cf.* provisions in section 367 (1) as to "contents of judgment," and *I. L. R.*, XXIX Cal., 726 (F.B.) (3), where it was laid down that an order of discharge by a Magistrate under section 253, Criminal Procedure Code, upon a withdrawal of the complaint by the complainant was not a "judgment" within the meaning of that section. The "discharge" in that case, if the offence was compoundable, would have had the effect of an acquittal as here; and either

(1) (1899) 3 Cal. W. N. 322 (*Kusum Bewa v. Bechu Bewa*).

(2) (1899) 3 Cal. W. N. 548, (*Mahomed Ismail v. Faiz-ud-din*).

(3) (1902) *I. L. R.* 29 Cal. 726 (F.B.) (*Mir Ahmad Hossein v. Mahomed Askari*).

way the applicability of that ruling to the present case is clear enough.

Cases like 4, *Bom. L. R.*, 7 8 (4), and 11, *P. R.* 1907 (*Criminal*) (5), quoted by Mr. Herbert have little or no relevancy here. In the former the police sent up under sections 325 and 511, Indian Penal Code (compoundable with sanction of Court) a batch of persons exceeding five, whose offence, if any, certainly came under section 148, Indian Penal Code (non-compoundable). A petition of composition was put in by the complainant and was allowed; but the High Court properly pointed out that the discretion allowed in connection with section 325 had in the circumstances of the case been wrongly exercised, and, further, that the real offence committed was a non-compoundable one. The difference between that case and the present one lies in this that here charges covering compoundable offences had been actually drawn up and read and explained to the accused persons and had been pleaded to, while there, no charge had yet been drawn up, and the Magistrate was not tied down to the sections quoted in the *chalan*, but had yet to consider what, on the record, was the substantive offence disclosed by the evidence.

In the Punjab case of 1907, on the other hand, certain persons having been *chalaned* under section 147, Indian Penal Code, the Magistrate having taken no evidence as yet and thus having no material for deciding on the facts, accepted a petition of composition on the ground that probably the case would turn out to come under section 323, section 324 or section 325, Indian Penal Code. Naturally the Chief Court refused to allow such an order to stand; but the case is clearly no guide for us here.

It is unnecessary to labour the point further. We think the answer to the reference should be that where a Court has drawn up a charge of an offence compoundable without sanction of Court, and this charge, having been read and explained to the accused, has been pleaded to, that Court should, upon the presentation to it of a petition of composition by the person mentioned in the last column in the table in section 345, Criminal Procedure Code, at once accept the petition and acquit the accused and has no power to alter the charge already drawn up.

Petition accepted.

(1) (1902) 4 *Bom. L. R.* 718 (*Emperor v. Asmat Hasan*),
(2) 11 *P. R. (Cr.)* 1907, (*King-Emperor v. Hira Singh*).

No. 30.

Before Hon. Mr. Justice Johnstone and Hon. Mr.
Justice Scott-Smith.

JAWAN AND WALAYAT ALI—(CONVICTS)—
APPELLANTS,

Versus

CROWN—RESPONDENT.

Criminal Appeal No. 590 of 1914.

Confession—retracted—value of—in respect of person making it and in respect of co-accused.

Held, that the net result of the authorities on the value of retracted confessions is—

(i) That it is not illegal to base a conviction upon the uncorroborated confession of an accused person, provided the Court is satisfied that the confession was voluntary and is true in fact;

(ii) That, from the point of view of legality pure and simple, the fact that a confession has been retracted, is immaterial;

(iii) That the use to be made by the Court of a confession, whether retracted or not, is a matter rather of prudence than of law, the business of the Court being to make up its mind, in accordance with the dictates of common sense, whether it is safe to believe the confession or not;

(iv) That experience and common sense shew that, in the absence of corroboration in material particulars, it is not safe to convict on a confession, unless, from the peculiar circumstances in which it was made, and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine;

(v) That, when it is a question of using a confession against a co-accused of the person confessing and the Court would not be prepared to accept the confession *per se* as sufficient, the corroboration ought to be of the kind that not only confirms the general story of the crime but also unmistakably connects the said co-accused with the crime.

16 P. R. (Cr.) 1903 (1), 21 P. R. (Cr.) 1910 (2), 5 P. R. (Cr.) 1911 (3), I. L. R. 29 All. 431 (4), 153 P. L. R. 1910 (5), 21 P. R. (Cr.) 1869 (6), I. L. R. 27 Cal. 295 (7) and 3 P. W. R. 1907 (8) and remarks under section 24, Indian Evidence Act, in Amir Ali's Law of Evidence, 5th Ed., p. 255, referred to.

Held, applying these principles to the present case that the retracted confession by accused 2 corroborated by his production of the axe and its handle should be accepted as against himself but not as against accused 1.

(1) 16 P. R. (Cr.) 1903 (*Sajjad Hussain v. Emperor*).

(2) 21 P. R. (Cr.) 1910 (*Gul Hassan v. King-Emperor*).

(3) 5 P. R. (Cr.) 1911 (*Ataya v. Crown*).

(4) (1907) I. L. R. 29 All. 431 (*Emperor v. Kehri*).

(5) 153 P. L. R. 1910 (*Bhog Singh v. Emperor*).

(6) 21 P. R. (Cr.) 1869 (*Crown v. Mussammat Pairee*).

(7) (1899) I. L. R. 27 Cal. 295 (*Queen Empress v. Jadub Das*).

(8) 3 P. W. R. 1907 (*Mussammat Chandan v. Crown*).

Appeal from the order of Lieutenant-Colonel C. P. Egerton, Sessions Judge, Rawalpindi Division, dated the 18th day of June 1914.

Fazal Ilahi, for appellants.

Government Advocate, for respondent.

The judgment of the Court was delivered by—

JOHNSTONE, J.—Two men, Jawan accused 1 and Wilayat Ali 13th August 1914.
accused 2, have been convicted under section 302, Indian Penal Code, of the murder of one Shakar, on 10th March last, the former being sentenced to death and the latter to transportation for life. The learned Sessions Judge calls the latter punishment penal servitude, but he no doubt means what we have said. They have both appealed and we have heard Mr. Fazal Elahi on their behalf and the learned Government Advocate on behalf of the Crown.

According to the prosecution these two men intercepted Shakar on his way home at a certain *Kassi*, a mile or so from his and their village Pind Dakhili Marigala, *Tahsil* Kahuta, District Rawalpindi, and took him on a certain pretext down the ravine to a convenient spot, where, taking him unawares, first accused 1 struck him from behind with an axe below the right jaw, felling him to the ground, whereupon accused 2, at the instance of accused 1, fractured his skull by a blow with the back of an axe on the forehead. Accused 2 followed this up, the handle of his axe having broken, by another blow on the head with a stone, and finally accused 1 struck him again with the back of his axe and with stones. This is said to have happened on Tuesday, March 10th, 1913, late in the afternoon, and the reason for the outrage, as stated or suggested, was two-fold: deceased, who had recently returned from Burma from service in the Royal Artillery, had deposited Rs. 300 with accused 1, who is said to have wished to avoid repayment, and further accused 1 is said to have had a *liaison* with P. W. 2, the young wife of deceased whom the latter had married two months before his departure for Burma five years before the murder. Accused 1 and deceased are cousins on both the mother's and father's side, and accused 2 is first cousin of accused 1, and is supposed to have joined accused 1 in the affair at his request without promise of reward, merely out of friendly feeling.

The body was not found until it was accidentally seen on Friday, 13th March, by Allahdad, P. W. 21, who observed a

stick lying near it and a handkerchief some way off and who sent a message to the *zaildar*. Report was made at the *Thana* at 2 a. m. on 14th March and the police duly arrived at 5 a. m. We may say at once that there is no doubt whatever as to the identity of the corpse or as to the cause of death, for, though somewhat decomposed, it had not been mangled by bird or animal. No suspects were named at that time. Footprints were noticed near the spot and covered up, and according to the police diaries, one Allah Rakha, tracker, compared the tracks with those of the two accused and with deceased's shoes and found correspondence; but apparently the police must have had doubts on the subject, for they sent up no track evidence with the *chulan*. In our opinion the accused are entitled to take this as a point in their favour.

We have carefully examined the record and we find against the accused persons the following evidence, namely—

(a) The confession of accused 2, implicating equally himself and accused 1, made in the Committing Court on 3rd April, but retracted at the trial.

(b) Deposition of Dost Muhammad, P. W. 6, who says he met the accused persons and deceased together where the road crosses the *Kassi* and saw them go off down the latter.

(c) Deposition of Muhammad Hasan, P. W. 4, a boy of 12, who, with the two accused, is said to have been the only herdsmen in the village, and who testifies that on the fatal afternoon the accused at *digavela* left him in charge of their flocks, saying they had to go home to eat, and never returned, the boy, according to practice, taking home their flocks for them.

1. Blade of an axe. 2. Piece of handle thereof. 3. Three pieces. 4. Three more pieces of aforesaid handle: See P. W. 23.

(d) The production of the articles mentioned in the margin by accused 2.

(e) The presence of blood on certain things, see later in this judgment.

(f) The presence of colouring matter of blood on certain other things, see later on.

(g) Evidence of motive.

The decision of the case seems to us to depend almost entirely on (a) and (d), the confession of accused 2 and his

action in connection with his confession. We have heard an

16 P. R. 1903 (Cr.) (1), 24 P. R. argument on the value of retracted
1910 (Cr.) (2), 5 P. R. 1911 (Cr.)
(3), I. L. R. XXIX All. 434 (4),
153 P. L. R. Volume 10 (5), 21
P. R. 1869 (obsolete) (6), I. L. R.
XXVII Cal. 295 (7), 3 P. W. R.
1907 (8).

confessions, and have consulted
the rulings noted in the margin
and also the remarks* under
section 24, Indian Evidence Act,

*Page 255, 5th
edition.

in Ameer Ali's valuable work on the Law of Evidence in India.
The net result of the authorities seems to be this :—

(i) That it is not *illegal* to base a conviction upon the un-
corroborated confession of an accused person, provided the
Court is satisfied that the confession was voluntary and is true
in fact ;

(ii) That, *from the point of view of legality pure and simple*,
the fact that a confession has been retracted, is immaterial ;

(iii) That the use to be made by the Court of a confession,
whether retracted or not, is a matter rather of prudence than
of law, the business of the Court being to make up its mind,
in accordance with the dictates of common sense, whether it is
safe to believe the confession or not ;

(iv) That experience and common sense shew that, in
the absence of corroboration in material particulars, it is not
safe to convict on a confession, unless, from the peculiar
circumstances in which it was made, and judging from the
reasons, alleged or apparent, of the retraction, there remains
a high degree of certainty that the confession, notwithstanding
its having been resiled from, is genuine ;

(v) That, when it is a question of using a confession
against a co-accused of the person confessing and the Court
would not be prepared to accept the confession *per se* as sufficient,
the corroboration ought to be of the kind that not only confirms
the general story of the crime but also unmistakably connects
the said co-accused with the crime.

It is clear, therefore, that no part of the evidence in the
case must be lost sight of, and we proceed to discuss first, the
evidence of motive for the crime. As regards accused 2 no
motive appears except perhaps the influence of accused 1, as near
kinsman and friend, causing accused 2 to appropriate the

(1) 16 P. R. (Cr.) 1903 (*Sajjad Hussain v. Emperor*).
(2) 21 P. R. (Cr.) 1910 (*Gul Hassan v. King-Emperor*).
(3) 5 P. R. (Cr.) 1911 (*Ataya v. Crown*).
(4) (1907) I. L. R. 29 All. 434 (*Emperor v. Kehri*).
(5) 153 P. L. R. 1910 (*Bhag Singh v. Emperor*).
(6) 21 P. R. (Cr.) 1869 (*Crown v. Mussammat Pairce*).
(7) (1899) I. L. R. 27 Cal. 295 (*Queen Empress v. Jadab Das*).
(8) 3 P. W. R. 1907 (*Mussammat Chandan v. Crown*).

desires of accused, as his own. Taking, first, the alleged passion of accused 1, for deceased's wife, we have on the record—

(1) Her statement that accused 1 once accosted her, the implication being that he made some improper proposal, which, being repelled, he never troubled her again ;

(2) The statement of Hashmat Ali, P. W. 3, that the lady complained to him of molestation by accused 1, but never complained again after witness had remonstrated with him ;

(3) The statement of Gaman, P. W. 22, that he “ never heard any breath of scandal ” with respect to the lady and accused 1 ;

(4) The statement by accused 2 in his confession that accused 1 had an illicit intimacy with the lady ;

(5) The further statement of Hashmat Ali, when asked why he suspected the accused 1, that he did so “ for the sake of the money ”, making no mention of the alleged *liaison*.

Now this, taken as it stands, appears to us rather a slender foundation for the theory that accused 1 was so consumed by passion for the lady as to plot a brutal murder in order to get the husband out of the way. It is easy for the learned Government Advocate to suggest that all these witnesses are trying to minimise the matter, but after all we must go by the record and we cannot see that we have sufficient indication here of motive for a murder.

We turn next to the matter of the money. This need not take us long. The fact of deposit of the money with accused may be true or not. All one can say is that, if, on the evidence before us, deceased had sued accused 1 for it, it is doubtful whether any Court would have given him a decree. But even if, for the sake of argument, we concede the fact of deposit, we find absolutely no evidence that accused 1 was making difficulties about repayment. Hashmat Ali aforesaid seems to have been nervous about the repayment—see his evidence and the post card,* Exhibit P. P., but we fail to see how this is any evidence against accused 1. The witness has not ventured to explain why he thought accused 1 was going to embezzle the money, and we have not a tittle of evidence that deceased or any one else ever demanded the money from accused 1, or that he ever expressed any intention of refusing refund, or that he had spent the money. Here too, of course, it can be argued that there is a conspiracy of silence ; but we have only the

*Page 8, paper-book.

record to go upon. It is fairly clear, therefore, that no adequate motive for the murder is made out.

We turn next to the circumstances leading up to the confession by accused 2—see evidence of P. W. 23, the *Thanadar*, On 14th the house of accused 1 was searched and next day that of accused 2, in neither case anything incriminating being found. On 14th from the person of accused 1 were taken a *safa* and *kur'a* which appeared to be bloodstained. On 16th the loin cloth of one Husain, also a suspect, and the turban and loin cloth of accused 2 were taken over as having suspicious marks. Next day at 2 p. m. the *kurta* of Bakar, another suspect, was taken over, and an hour later the report of the *post mortem* examination arrived. Soon after that it was learnt that P. W. 6, Dost Muhammad, was saying he had seen the accused and deceased together in the *Kassi*, and at 6 p. m. he made a statement. Next morning 18th March, accused 2 made a detailed statement to the *Thanadar*, confessing the crime and implicating accused 1, but no statement seems to have been made to a Magistrate until 3rd April, 11 days before committal to the Sessions. The Committing Magistrate did not examine accused 2 again nor even take his plea, and we are therefore uncertain what his attitude in that Court was.

The history of the matter thus seems natural enough. There was a gradual accumulation of evidence culminating in the statement of P. W. 6; and accused 2, seeing danger approaching and the net closing in on him, may have thought the game was up and that he might gain and could not lose by helping the police and telling a tale. We are inclined to look upon the confession as purely voluntary, corroborated as it is by the production of the axe and its handle, though we are not inclined to attach too much importance to the evidence of P. W. 6; but this must not blind us to the distinction between the effect of the confession as against accused 1 and accused 2, respectively. We may note at once here that we look upon the matter of the production of axe and handle, (*d*) above, as peculiarly valuable, for the story of the different pieces of the handle is hardly one that could have been invented, the burying of one piece in the *jungle* as being blood-stained and the consignment of the other two pieces to his stock of firewood having the stamp of truth on it, and the axe head was produced from a hole in the ground in the inner

courtyard of Umar, accused 2's uncle, where it could hardly have been put by an enemy or by the police.

*17th and 18th
March, respectively.

Turning next to the depositions of Dost Muhammad and Muhammad Husain, (b) and (c) above, all we can say is that they may be true; but against them both is the fact that they did not come forward very promptly* and the latter's statement does not carry us far. Dost Muhammad admits, without explanation, that he was coming from Daud Gali to Mohra Nangrial at the time and that he did not take the natural "main road" between those two places but another route; and while before the Committing Magistrate he said accused 1 had an axe with him, in the Sessions Court he said he "saw" that accused 1 "had nothing." Lastly, he contradicts the *Thannadar* by saying that for 6 days he came before him and was questioned and said invariably that he knew nothing, the *Thannadar* denying that he never spoke to him till the 17th. These facts seem to us to deprive the deposition of Dost Muhammad of nearly all value.

We need not trouble about the piece produced by accused 2, as the case is complete against him without that, and the other accused is not affected; but to complete our survey a few words are necessary about the blood-stained articles—see Chemical Examiner's Report at page 4, paper-book—Mammalian blood was found on Baker's "sweater," and on the pieces of axehandle, and colouring matter of blood, not as Mr. Fazal Ilahi would have it, merely some reddish stuff on a *chadar* (also called *safa*) and *kurta* of accused 1, on a *chadar* of Husain's, and on the axe-head. Where the other evidence is strong, evidence of blood on clothes may sometimes afford useful support to a case, but here it is noticeable that neither of the lower Courts asked accused 1 to explain how blood came to be on his things and we are not disposed to attach much importance to the incident.

Looking at the whole case as stated above, we are driven to the conclusion that accused 2 was certainly one of the murderers, if there were more in it than one. We can see no other explanation of his confession to the Committing Magistrate and of his production of the axe and its handle. We are by no means satisfied of the guilt of accused 1. Putting aside the depositions of Dost Muhammad and Muhammad Hasan and holding adequate motive not made out, we have really nothing against him but the confession of the co-accused and the existence of bloodstains on *kurta* and *safa*.

It may seem at first sight a little inconsistent to accept the confession as true, *qua* accused 2 himself and to reject it as unworthy of reliance, *qua* accused 1; but a moment's reflection will suffice to show that this is not so. We are satisfied that accused 2 was one of the murderers, his story and conduct prove this. But there is always a possibility that, for reasons unknown to us, he may have falsely implicated accused 1, perhaps to screen some one else; and the reason why it is unsafe and unfair to accept accused 2's denunciation of accused 1 as gospel truth is, that accused 2 was not on solemn affirmation, and his story was not and could not be tested by cross-examination, and is therefore not so valuable as even an approver's story would be. The wording of section 30, Indian Evidence Act, shews that the Legislature has fully recognised this aspect of the matter. Accused 2 may have told the story correctly enough except as to the name of his comrade, who may have been one of the suspects, Baker and Hussain, or some other man not known to us.

We therefore accept the appeal as regards Jawan accused, and acquit him, and we reject the appeal as regards accused 2, Wilayat Ali. In our opinion the latter has been lucky in escaping the death penalty; but we do not intend to interfere in this connection, as Government does not press for enhancement.

Appeal accepted.

No. 31.

Before Hon. Mr. Justice Johnstone and Hon. Mr.

Justice Scott-Smith.

NAWAB AND DULLAH—(CONVICTS)—APPELLANTS

Versus

CROWN—RESPONDENT.

Criminal Appeal No. 206 of 1914.

Indian Penal Code, section 300, clauses 1—4—murder—intention.

The two accused, brothers, between whom and the deceased and his son was bad feeling, came upon the deceased in the fields and setting upon him, beat him with sticks so severely that he died within a few minutes, no less than 14 ribs being fractured resulting in rupture of both lungs and of the spleen—the Sessions Judge found the accused guilty of murder under the fourth clause of section 300 of the Penal Code.

Held by the Chief Court, that the crime fell under the first or second clause of section 300 of the Penal Code, as the intention was clear whether to kill or to cause dangerous injury and thus the case was taken out of the purview of clause 4 which applies to cases, in which there is no wish to kill or to hurt.

Appeal from the order of B. H. Bird, Esquire, Additional Sessions Judge, Gujranwala Division, dated the 11th day of February 1914.

Muhammad Mir, for appellants.

Manohar Lal, for respondent.

The judgment of the Court was delivered by—

15th August 1914. JOHNSTONE, J.—Nawab and Dullah were placed before the Sessions Court of Gujranwala (Additional) charged with the murder, on 12th June 1913, of Allah Bakhsh, *alias* Ilahia. The assessors found Nawab guilty but absolved Dullah. The learned Sessions Judge, however, found both men guilty and sentenced both to transportation for life. He brought the case under the fourth clause of section 300, Indian Penal Code, and apparently this was the reason for not inflicting the extreme penalty; to this subject we shall return later.

Both convicts have appealed and we have heard the case fully argued by Mr. Muhammad Mir for the appellants and by Mr. Manohar Lal for the Crown, with the result that, notwithstanding the minute and careful arguments of the former, our opinion is that both the appellants are guilty.

The case for the Crown, briefly put, is that there was bad feeling between the appellants, who are brothers, and the deceased and his son Khudadad, that two days before the murder Khuda Dad and his cousin Ghulam Rasul had had a fight with Nawab, appellant, over the lopping of their trees by the appellants and had beaten Nawab, that on 12th June 1913 the appellants came upon deceased in the fields and, setting upon him, beat him with sticks so severely that he died within a few minutes, no less than 14 ribs being fractured, resulting in rupture of both lungs and of the spleen.

The medical evidence is clear and is quite in keeping with the testimony of the "eye-witnesses" who are five in number. Of these the most important are the three boys Nawab (7), Sardara (12) and Ranjha (7), P. W. 4 to 6, who were in the immediate neighbourhood pasturing cattle, and whose stories are clear and consistent as to the actual occurrence. Their outcries brought on the scene the two adult eye-witnesses, Fakiria (P. W. 7) and Rahmat (P. W. 8), who from a distance saw the beating going on, and whose stories are also *prima facie* straightforward and substantially uniform.

We have said there were five eye-witnesses, though the prosecution have added Khudadad aforesaid, P. W. 3, as

we have grave doubts about his having seen the actual beating of his father, our reason being that, when he made the "first report" at the Thana some 3 hours after the affair, he said plainly that he was at the village when the news of the outrage reached him (not, as he says in Court, at the Khasianwala well with P. W. 7 and 8), and that when he arrived on the scene his father was dead. We think this is sufficient ground for holding that he was really no eye-witness, but that, in his not unnatural zeal against the murderers of his father, he has pretended to have seen the actual affair and has persuaded his fellow-witnesses to co-operate in the pretence.

The above case has been attacked by the learned Advocate for the appellants on various grounds. He first complains that the eye-witnesses are related to the deceased, but this is only partially true, for the boy Ranjha (P. W. 6) and the adult Rahmat (P. W. 8) are not so related. The presence of the boys is natural enough; they were with deceased tending the cattle, and the other two witnesses, both of whom work at the aforesaid well, were easily within earshot—see the Patwari, P. W. 2, who says that the well is 160 *karams* only from the scene of the murder.

Then it is asked why other men did not come from other wells close by, two of which are mentioned by the *patwari* as being about the same distance away as the aforesaid well. This criticism is seen to have little or no force, when it is considered that in the middle of June, unless extra Rabi crops are being watered, there is not much doing in the way of agriculture, and those other wells may have been for the time devoid of human beings.

Next, a discrepancy is pointed out thus—in the "first report" Khudadad said that in the *fracas* two days previously he and his cousin were beaten by the appellants, whereas in Court he said the beating was on the other side. We think nothing of this, in both cases the real meaning is simply that there was a fight.

monar
discrepancy

Again, much stress is laid on the circumstance that Khudadad has changed his story, as stated above; but we are not disposed to look at this matter in a pedantic way. In this country, complainants with a good and true case frequently are foolish enough to try to improve it by devices so transparent that Courts have little difficulty in separating the false from the true; and here we have no hesitation in holding that, while Khudadad and his fellows are lying when they represent him

as an eye-witness the story of what occurred is, apart from this, substantially true.

It is hardly necessary to notice seriously the further arguments that there are discrepancies in the statements of the boys as to how many cattle they had with them and as to who stayed and who did not stay by the corpse; and so we turn to the defence. We think nothing of the evidence of Nur Din, D. W. 2, who says he was at one of the neighbouring wells that morning and heard nothing, for his own statement makes it clear that he could not have been there. An affair like this could not have gone through without cries from the victim, if not from spectators; and any man within a few hundred yards must have heard, unless he was deaf or asleep. Then the *alibis* of both Nawab and Dullah are beneath contempt.

The assessors give no reason for absolving Dullah, except that it did not need 2 men to pasture 15 or 16 goats; but they have overlooked the fact that it is unlikely that one man beating another could have inflicted the very numerous injuries found on the body of the deceased in this case. The reason given seems to us a singularly inadequate one for throwing over a mass of clear and straightforward evidence, and we can only conjecture that lurking in the assessors' minds may have been the not uncommon sentiment that, for the murder of one man, only one man should be hanged.

This brings us to a consideration of the finding of the learned Sessions Judge and of the sentences passed. Looked at in a plain commonsense way it seems to us that the crime falls under either the first or the second clauses of section 300, Indian Penal Code. It is hard to see how two ruffians, beating an unarmed man to a jelly and fracturing 14 ribs could have had any intention short of causing death or causing such bodily injury as they knew was likely to result in death. Can it be supposed that, in inflicting such a cruel and barbarous beating, they really expected or wished their unfortunate victim to survive? No doubt there was only one (not very serious) injury to the head, but in view of the nature of the other injuries this is immaterial; and we really find it hard to see why these men should not have been sentenced to death, though, in the absence of application for enhancement of sentences and in consideration of the long time that has elapsed since the sentences were passed, we are not disposed to take the matter up.

A few words must be added as to the Sessions Judge's application of the fourth clause of section 300. The cases

in which that clause has any application are, according to our experience, extremely rare ; and, though it is not easy, and perhaps not desirable, to attempt to define with any strictness the kind of cases in which that clause comes in, we think there is one very broad distinction between it and the first three clauses, which should have warned the Sessions Judge against applying it here. In the first three clauses the important thing is *an intention* to kill or to hurt, while the fourth clause says nothing about *intention*.

In the present case intention is clear, whether to kill or to cause dangerous injury ; and thus the case is at once taken out of the purview of the fourth clause, which seems to apply to cases in which there is no *wish* to kill or to hurt. We commend these remarks to the learned Sessions Judge's most earnest consideration.

Holding both the appellants guilty of murder, we dismiss this appeal.

Appeal dismissed.

No. 32.

Before Hon. Mr Justice Johnstone.

ABDUL KARIM—PETITIONER,

Versus

CROWN—RESPONDENT.

Criminal Revision No. 1494 of 1914.

Criminal Procedure Code, 1898, section 514—forfeiture of security bond.

The petitioner stood surety in the sum of Rs. 500 for the appearance in Court, *up to the conclusion of the case*, of a man who had been called upon under section 110, Criminal Procedure Code, to furnish security for good behaviour. The case was found proved against the man and he was directed to produce sureties for good behaviour, but he failed to appear ; proceedings were thereupon taken against the petitioner for the forfeiture of his bond and the lower Courts ordered forfeiture to the extent of Rs. 200.

Held, that the order of the lower Court was correct as the case was not complete, nor were the Magistrate's duties in connection therewith at an end, until the culprit had appeared with his sureties and executed his bond.

*Petition for revision of the order of J. Wilson-Johnston, Esquire,
District Magistrate, Jhelum, dated the 9th May 1914.*

Noor-ud-Din, for petitioner.

Nemo, for respondent.

The order of the learned Judge was as follows :—

2nd Sept. 1914.

JOHNSTONE, J.—There are no grounds for interference. The petitioner, Abdul Karim, stood surety for the appearance in Court, up to the conclusion of the case, of a man who had been called upon under section 110, Criminal Procedure Code, to furnish security for good behaviour. After some hearings the Court, on 18th February 1914, found the case proved against that man and he was directed to produce his sureties, but he failed to appear.

I cannot accede to the contention that the petitioner's liability ceased when the Court held that the case was proved. The case was not complete, nor were the Magistrate's duties in connection therewith at an end, until the culprit had appeared with his sureties and executed his bond.

I dismiss the petition.

Petition dismissed.

No. 33.

Before Hon. Mr. Justice Scott-Smith.

CROWN

Versus

BHAGWAN DAS—ACCUSED.

Criminal Revision No. 1140 of 1914.

Excise Act, XII of 1896, section 49—sale by medical practitioner of medicine containing some brandy.

Held, that a medical practitioner who put a little brandy into one of the medicines prescribed and sold it to a patient, has not committed the offence of illicitly selling spirit within the meaning of section 49 of the Excise Act.

Case reported by P. L. Barker, Esquire, Sessions Judge, Jhelum, with his No. 372, dated the 2nd June 1914.

Nemo, for Crown.

Nand Lal, for accused.

Charge :—Under section 49 of the Excise Act.

The facts of this case are as follows :—

One Bhagwan Das, a foreign liquor contractor of Pind Dadan Khan, about the 8th or 9th of October last, observed two carriers passing his door with a wired and sealed box, of the pattern in which bottles of spirit are usually packed. As they passed one of the carriers said, "this is for Bhagwan Das" to which the other replied, "no, not this Bhagwan Das, Bhagwan Das, Doctor."

Upon this the liquor contractor began to reflect that the vendors of medicines in Pind Dadan Khan, when in want of spirit for the making up of prescriptions, were in the habit of obtaining it from him, but that "Bhagwan Das, Doctor," the present applicant, was an exception to this rule. He suspected, therefore, that the man had a private supply of spirit which he was in the habit of selling, either as an ingredient in the medicines compounded by him, or otherwise. Five or six days later the Excise Inspector visited Pind Dadan Khan, and to him the liquor contractor communicated his suspicions. The two put their heads together, and got a prescription written in which brandy was one of the ingredients. This prescription was made over to one Gobind Sahai, who was given a rupee, and was sent off to the shop of the present applicant to get the prescription made up.

The idea of the liquor contractor and Excise Inspector, of course, was that the applicant had his own private supply of brandy, and would be tricked into indenting on that supply in order to make up the prescription. In this pious hope they were completely disappointed, for the evidence of their own emissary, Gobind Sahai, himself shows that, when he went to the applicant, the latter remarked that the prescription contained 3 *chhatanks* of brandy, which he told the witness to go and get himself. The witness replied that he knew nothing about such matters and could not go himself, but would pay for the brandy if the applicant would get it for him. The applicant then sent off a man to procure the spirit, which he did from some source unknown, and on his return the prescription was duly completed. For the mixture, for which the applicant himself provided a bottle, he charged Rs. 1-5-0, of which Rs. 1-3-0 was paid at the time and annas two later.

The accused on conviction by E. G. F. Abraham, Esquire, Magistrate, 1st Class, Jhelum District, dated 7th March 1914, was sentenced under section 49 of the Excise Act, to pay Rs. 20 as fine.

The present is an application for revision presented by the accused Chemist praying that the conviction and sentence may be set aside, and the proceedings are forwarded for revision on the following grounds :—

It seems to me that the conviction was wrong, on the simple ground that there was no sale by the applicant. No doubt, the applicant procured the brandy from outside, poured it into the mixture, and charged Govind Sahai for the whole

mixture ; but there is nothing to show how much he charged for each ingredient in the mixture, nor is there anything to show where his servant got the brandy from, or what he paid for it. In other words, there is nothing to show that the applicant made any profit over the transaction, and, that being so, *I. L. R.* 31 All. 293 (1) is an authority for holding that the applicant cannot be said to have "sold" to Govind Sahai. In fact, it appears to me that the applicant acted merely as an agent for Govind Sahai, the purchaser, and that the only seller was the unknown person from whom the applicant's servant made the purchase.

ORDER OF THE CHIEF COURT.

31st July 1914.

SCOTT-SMITH, J.—I fully agree with the Sessions Judge. I think it would be monstrous to hold that a medical practitioner, who put a little brandy into one of the medicines prescribed and sold by him to a patient, thereby contravened the provisions of the Excise law and sold brandy.

I agree that there was no such sale as contemplated in the Excise Act and I therefore accept the revision, and set aside the conviction and sentence, and acquit Bhagwan Das, and order refund of the fine.

Revision accepted.

No. 34.

Before Hon. Mr. Justice Chervis and Hon. Mr. Justice Shadi Lal.

JOWALA SAHAI (CONVICT)—APPELLANT,

Versus

CROWN—RESPONDENT.

Criminal Appeal No. 552 of 1914.

Indian Evidence Act, I of 1872, sections 6 and 122—evidence of what was said by a by-stander sometime after commission of crime—evidence of wife of what her husband told her—relevancy of.

In the trial of certain persons for murder several witnesses were produced who testified to the fact that one S. had told them the morning following the night on which the murder was committed that he had seen the accused commit the murder. S. himself was also produced but denied all knowledge of the occurrence. The lower Court also admitted the evidence of one Mussammat J., the wife of one of the accused, disclosing communications made to her by her husband.

(1) (1909) *I. L. R.* 31 All. 293 (*Emperor v. Panna Lal*).

Held, that any evidence as to what S. said in the morning was inadmissible as hearsay and could not be admitted as a relevant fact under section 6 of the Evidence Act, as the words were not said *during* the transaction, but *subsequent* to its completion.

11 *Cal. W. N.* 266 (1) and *Ameer Ali and Woodroffe's Law of Evidence* (note under section 6), referred to.

Held also, that the evidence of Mussammat J., the wife of one of the accused, as to certain communications between her and her husband was inadmissible under section 122 of the Evidence Act.

27 *P. R. (Cr.)* 1913 (2), referred to.

Appeal from the order of T. P. Ellis, Esquire, Sessions Judge, Shahpur Division, at Sargodha, dated the 9th June 1914.

Muhammad Shafi and Nanak Chand, for appellant.

Fazal-i-Hussain, Jai Gopal Sethi and D. B. Daulat Ram, for respondent.

The judgment of the Court was delivered by—

SHADI LAL, J.—

* * * * * 1st August 1914.
* * * * *

The learned Sessions Judge states that “it has, owing to certain decisions, notably one of the Chief Court in the recent Jabbi murder in this District, come to be regarded as highly dangerous to mention the actual criminals in the first report, because it lays it open to the allegation that the case was concocted before the police arrived.”

We are unable to say anything as to what is contained in the other judgments of which no particulars are given by the learned Judge, but as regards the Jabbi murder case (case No. 272 of 1914), we must observe that the judgment of the Chief Court was not pronounced till the 12th of May 1914, *i. e.*, about two weeks after the date of the report in the present case and we fail to understand how that decision could possibly have any effect on a report made several days before. Further, after reading the judgment, we do not find any remarks therein which deprecate the mention of the names of the actual offenders in the first report or make the slightest suggestion of that kind. The case for the prosecution there failed because the learned Judges of this Court were of opinion that there was not sufficient evidence to warrant the conviction and made the following pertinent observations:—“Indeed, we do not say that any false evidence has been fabricated. We do, however, find that the

(1) (1906) 11 *Cal. W. N.* 266 (*Chain Matho v. Emperor*).

(2) 27 *P. R. (Cr.)* 1913 (*Bishen Das v. Emperor*).

"evidence is not reliable and we cannot support the conviction."

If, as the learned Sessions Judge states, there is an impression among the people that it is dangerous to mention the actual criminals in the first report, we take this opportunity of stating emphatically that it is altogether unfounded and that this Court always attaches very great importance to the statements contained in the first report, if it is recorded without unreasonable delay, and considers it necessary that persons making the report should state all the details about the crime which are known at that time. Indeed, the omission of the names of the offenders is, as in this case, urged always as a point against the prosecution and this defect should, as far as possible, be avoided.

Coming now to the evidence against the accused we find that the case for the prosecution rests almost entirely on the testimony of four persons, namely Dittu, Imam, Mussamat Jawai and the tracker; Allah Rakha, the first witness, implicating only Sajawali, Muhammad and Shera; and the last proving footprints of only Sajawali and Shera.

Sardara, the only person who is alleged to be the eye-witness of the occurrence, denied all knowledge both in the Committing Magistrate's Court and in the Sessions Court. Any evidence as to what he said in the morning is clearly inadmissible as hearsay and we are unable to agree with the learned Sessions Judge that under section 6 of the Indian Evidence Act the statement made by Sardara to other persons can be proved against the accused for the purpose of shewing that the names of Sajawali, Muhammad and Shera were mentioned as the murderers. That section gives statutory recognition to a well known rule of the law of evidence that facts which form part of the *res gestæ* are admissible in evidence. But this rule only applies when the facts are so connected together as to form part of the same transaction.

As observed in *Chain Matho v. The Emperor*, reported as 11 C. W. N. page 266 (1), "in order to make the statement of a by-stander admissible, it must have been made, as contemplated by section 6 and illustration (a) to it, at the time the transaction was taking place or so shortly before or after it as to form part of the transaction. If the transaction has terminated and then the statement is made, the

“statement is irrelevant. The admissibility is dependent on “continuity.”

To the same effect is a passage in Ameer Ali and Woodroffe's Law of Evidence. The facts admissible under section 6 “must be necessary incidents of the litigated act “in the sense that they are part of the immediate preparation for or emanations of such act and are not produced “by the calculated policy of the actors. They are the act “talking for itself, not what people say when talking about “the act. In other words, they must stand in an immediate “causal relation to the act—a relation not broken by the inter- “position of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether “such incidents are doings or declarations, become in this “way evidence of the character of the act. They are admissible though hearsay, because in such cases it is the “act that creates the hearsay, not the hearsay the act. It “is the power of perception unmodified by recollection that “is appealed to; not of recollection modifying perception. “Whenever recollection comes in, whenever there is opportunity for reflection and explanations—then statement ceases “to be part of the *res gestæ*. Declarations to be admissible “must be made during the transaction. If made after its “completion they are too late.”

In the case before us, we find the murderers had left the place, the transaction had terminated and then the alleged statement was made to the persons who came to the scene of occurrence after hearing the noise. We cannot therefore regard this statement as forming part of the same transaction as the murder and must hold that it cannot be used against the accused. The case in 11 C. W. N. (1) is very similar and lays down the correct rule.

* * * * *

The most important witness for the prosecution is *Mussanmat Jawai*, the wife of *Sajawali*, accused, and the sister of *Tali*, deceased; and if her evidence is to be believed, all the accused are undoubtedly guilty of murder. Her testimony relates to two matters. In the first place, she says that four days before the murder she, in the afternoon, went to fetch drinking water and while passing by *Jawala Sahai's baithak* overheard the four accused there

(1) (1906) 11 Cal. W. N. 266 (*Chain Matho v. Emperor*).

conspiring to murder her brother. She then gives evidence as to certain communications between her and the husband which, under section 122 of the Indian Evidence Act, are clearly inadmissible in evidence and which the Sessions Judge should have excluded from the record (*vide* 27 P. R. 1913, Cr.) (1).

[The remainder of the judgment is not required for the purpose of this report].

Appeal accepted.

— — —
No. 35.

Before Hon. Mr. Justice Johnstone.

CROWN

Versus

FAZAL DIN—ACCUSED.

Criminal Revision No. 1305 of 1914.

Criminal Procedure Code, 1898, section 239—joint trial of persons accused of offences under sections 3 and 4, respectively, of the Gambling Act, III of 1867.

Held, that the joint trial of 19 persons convicted under the Gambling Act—one under section 3 for keeping a gambling den and the rest under section 4, for frequenting it and gambling there, is not covered by section 239 of the Code of Criminal Procedure and is illegal and must be set aside.

5 P. W. R. 1910 (2) and I. L. R. 25 Mad. 61 (P. C.) (3), referred to.

Case reported by P. D. Agnew, Esquire, Additional Sessions Judge, at Lahore, with his No 539 of 26th June 1914.

Charge :—Under sections 4—15 of Act III of 1867.

The facts of this case are as follows :—

On the report of Gulab Singh, Sub-Inspector, dated 15th August 1913, confirmed by other information, the Sub-Divisional Officer, Kasur, issued a warrant under section 5 of Gambling Act, III of 1867, in respect of a house, situate in the Kasur town, and on 16th August 1913, the instruments of gaming of different kinds such as dice, etc., detailed in exhibits II and P. III and currency notes of Rs. 30, together with cash, in Rs. 14 and silver pieces and pice amounting to Rs. 6-5-1½, were seized there; and all the accused, 22 in number, were found in the house and arrested.

(1) 27 P. R. (Cr.) 1913 (*Bishen Das v. Emperor*).

(2) 5 P. W. R. (Cr.) 1910 (*Makhan v. Crown*).

(3) (1901) I. L. R. 25 Mad. 61 (P. C.) (*Subrahmanya Ayyar v. King-Emperor*).

The accused, on conviction by Sardar Sohan Singh, exercising the powers of a Magistrate of the 1st class at Kasur in the Lahore District, were sentenced, by order dated 5th May 1914, under sections 4—15 of Act III, 1867, to one month's rigorous imprisonment.

ORDER OF THE CHIEF COURT.

JOHNSTONE, J.—Nineteen persons have been convicted under the Gambling Act—one Ghulam Haider under section 3 for keeping a gambling den and the rest under section 4 for frequenting it and gambling there. They have been tried together and the learned Sessions Judge has sent up the records with a recommendation that inasmuch as under a ruling of this Court 5 P. W. R. 10 (1), the joint trial was illegal, the convictions should be set aside and retrials ordered. The (P. C.) ruling I. L. R. 25 Mad. 61 (2), is also referred to as shewing that an error of this sort is not a mere curable irregularity, but is a fatal illegality. 6th Sept. 1914.

The ruling of 1910 (1) was by myself, and I find, on again considering the matter, that I am still of the same opinion. Persons can only be jointly tried, apart from cases of offenders and their abettors, if—see section 239, Criminal Procedure Code—they are accused of the same offence or of different offences committed in the same transaction. Now, here Ghulam Haider has been charged with an offence and the others with a distinct offence; and I do not think that the keeping of a gaming house and the being present in it at time of a police raid can be said to be part of the “same transaction.” I am aware of no exact precedent, but the rulings under section 239 aforesaid afford valuable analogies, and the above is my conclusion.

I therefore allow the revision and direct that, the convictions and sentences being set aside, the matter should be again tried, Ghulam Haider being tried separately from the other accused persons.

Revision allowed.

(1) 5 P. W. R. (Cr.) 1910 (*Makhan v. Crown*).

(2) (1901) I. L. R. 25 Mad. 61 (P. C.) (*Subrahmaniam Ayyar v. King-Emperor*).

No. 36.

Before Hon. Mr. Justice Johnstone.

MUNICIPAL COMMITTEE, JHANG—COMPLAINANT,

Versus

MUHAMMAD HAYAT—ACCUSED.

Criminal Revision No. 1211 of 1914.

Criminal Procedure Code, 1898, sections 91 and 96—summons to produce, and search warrant—whether enforceable against accused persons and in respect of what documents or things—Court's power to employ others to assist it in reading and understanding contents of documents.

Held, that the provisions of sections 91 and 96 of the Code of Criminal Procedure may be used against any person, including the person accused in the case.

Held also, that when the premises to be searched are those of the accused person it is not necessary that the warrant should be restricted to finding of the document, etc., in respect of which the alleged offence has been committed. The words "document or thing," in section 96 cover any document or thing, the production and inspection of which is "necessary or desirable" or will serve the ends of justice.

Held further, that a Criminal Court has power to invoke the aid of persons capable of helping it to read and understand the contents of books, etc., found.

I. L. R. 15 Cal. 109 (1), I. L. R. 38 Cal. 304 (2), I. L. R. 41 Cal. 261 (3), I. L. R. 37 Mad. 112 (4) and 5 Bom. L. R. 980 (5), referred to.

12 Cal. W. N. 1016 (6) and 9 Indian Cases 564 (7), differed from.

Case reported by P. J. Rust, Esquire, District Magistrate, Jhang, with his No. 1012, dated the 11th of June 1914.

Bahadur Chand, for complainant

Fazal-i-Hussain, for accused

Charge :—Under section 78 of Act III of 1911 (Municipal Act).

The facts of this case are as follows :—

The accused is prosecuted by the Municipal Committee for evasion of octroi. On February 21st, 1914, a commission was appointed by the Magistrate for the examination of the account books of the accused. On March 9th the accused filed an objection that such an order appointing a commission was illegal. The Magistrate agreed and cancelled the order

(1) (1887) *I. L. R. 15 Cal. 109 (Mahomed Jackariah and Coy. v. Ahmed Mahomed).*

(2) (1910) *I. L. R. 38 Cal. 304 (Bajrangi Gope v. Emperor).*

(3) (1913) *I. L. R. 41 Cal. 261 (Bissar Misser v. Emperor).*

(4) (1912) *I. L. R. 37 Mad. 112 (In re S. Kondaredti).*

(5) (1903) *5 Bom. L. R. 980 (In re Lakhmi Das).*

(6) (1908) *12 Cal. W. N. 1016 (Ishwar Chandra v. Emperor).*

(7) (1911) *9 Indian Cases 564 (Raj Chandra v. Hara Kishore).*

appointing the commission, by order, dated April 5th. Against this order that the Court was not authorised to appoint commissioners to examine the account books of the accused, the Municipal Committee filed an application for revision in the Court of the District Magistrate. The District Magistrate (Mr. Lumsden) by his order, dated April 23rd, 1914, rejected the application on the ground that the Criminal Procedure Code contained no provision for the appointment of commissioners, but held that the applicant's proper course was to apply for a search warrant under section 96, Criminal Procedure Code, and thereafter for inspection. Such an application was filed in the Magistrate's Court but the Magistrate rejected the application on the ground that it had no authority to issue such a warrant under section 96.

The proceedings are forwarded for revision on the following grounds :—

The point raised is a legal point of some interest. There have been several rulings of the Calcutta High Court and one recent ruling of the Madras High Court, but apparently there has never been a ruling of the Punjab Chief Court on this question.

After the date of the order of the Magistrate rejecting the application—for the issue of a warrant under section 96, Criminal Procedure Code, there have been two published rulings 41 *Calcutta* 261 (1) and 37 *Madras* 112 (2). In the Madras ruling it is laid down that the Magistrate always has the power to issue a search warrant to obtain the production of a document or other thing in the possession of the accused. "The issue of a summons is a milder means of attaining the same, and I am of opinion that the ruling in *Muhammad Jackariah and Company v. Ahmad Muhammad* (15 C. 109) (3) should be followed." Reference was also made to (1908) 12 C. W. N. 1016 (4), in which a contrary view was taken, but this was dissented from.

Previous to the recent Calcutta case (41 *Calcutta* 261) (4), there was a ruling of the Calcutta High Court, quoted in *Volume IX, Indian Cases*, page 564 (5), in which it was held that a search warrant under section 96 cannot be addressed to an accused person on his trial and he cannot be prosecuted under

(1) (1913) 1 L. R. 41 Cal. 261 (*Bissar Misser v. Emperor*).

(2) (1912) 1 L. R. 37 Mad. 112 (*In re Kondareddi*).

(3) (1887) 1 L. R. 15 Cal. 109 (*Mahomed Jackariah and Coy. v. Ahmed Mahamed*).

(4) (1908) 12 Cal. W. N. 1016 (*Ishwar Chandra v. Emperor*).

(5) (1911) 9 Indian Cases 561 (*Raj Chandra v. Hara Kishore*).

section 175 because of his failure to produce the document mentioned in the warrant. I mention this case specially because it is not referred to in 41 *Calcutta* 261 (1).

All the other previous rulings of the Calcutta High Court are referred to and discussed in 41 *Calcutta* 261 (1). The counsel for the accused has argued that the previous rulings have only been explained, but they have not been overruled and therefore they are still in force if applicable to any particular case. But the finding of the more recent ruling is equally applicable to this particular case. With reference to *I. L. R.* 38 *Cal.* 304 (2), it was held (in 41 *Cal.* 261) (1) that the wide proposition laid down in that case was not supported by the case to which reference was made (1908) 12 *C. W. N.* 1916 (3), and, secondly, that the meaning of the learned Judges was, not that search was prohibited altogether, but that it must be a search for a particular document or thing. The old ruling 15 *Calcutta* 109 (4) was also referred to, in which it had been held that a search warrant could be issued for documents in possession of the accused and that such documents could, after production, be inspected by the prosecution. In the light of these rulings, there appears to be no reason why a summons should not be issued under section 94 or a search warrant under section 96 for the production of the account-books of the accused.

I may note here one argument of the counsel of the accused, namely, that it has been held that a commission is not allowed by the Criminal Procedure Code, but, if the account-books are produced in Court, a man versed in Hindu accounts will have to be appointed to examine the books, and this will be the same as a commission. In my opinion this argument cannot hold good, because once a document is in Court, if it is in a language which the presiding Magistrate does not understand, he must have it translated. This is very different to appointing commissioners for the examination of the books outside the Court. After consideration of the rulings, I have formed the opinion that in this case a summons can legally be issued under section 94 to the accused for the production of his account-books, or under section 96 a search warrant can be issued, and that, after the production of the account-books in Court, they may be examined by the prosecution, and I there-

(1) (1913) *I. L. R.* 41 *Cal.* 261 (*Bissar Misser v. Emperor*).

(2) (1910) *I. L. R.* 38 *Cal.* 304 (*Bajrangji Gope v. Emperor*).

(3) (1908) 12 *C. W. N.* 1916 (*Ishwar Chandra v. Emperor*).

(4) (1887) *I. L. R.* 15 *Cal.* 109 (*Mahomed Jackarish and Coy. v. Ahmed Mahamed*).

fore forward the proceedings for revision of the order of the Magistrate, dated April 27th, 1911, rejecting the application of the complainant for the issue of a search warrant for the account-books of the accused, and the subsequent inspection of those books by the prosecution.

The order of the Chief Court was as follows :—

JOHNSTONE, J.—I have taken time to consider the question raised in this case and have consulted the following authorities :— 5th Oct. 1914.

I. L. R. 15 *Cal.* 109 (1) ; *I. L. R.* 38 *Cal.* 304 (2) ; *I. L. R.* 41 *Cal.* 261 (3) ; *I. L. R.* 37 *Mad.* 112 (4) ; 12 *C. W. N.* 1016 (5) ; 9 *I. C.* 564 (6) ; 5 *Bom. L. R.* 980 (7) ; with the result that I am in entire agreement with the learned District Magistrate. The greater weight of authority is on his side ; and 41 *Cal.* 261 (3), explains and distinguishes 38 *Cal.* 304 (2), which is quoted to me as against the District Magistrate. With the exception of 12 *C. W. N.* 1016 (5) and 9 *I. C.* 564 (6), there is thus nothing against the District Magistrate's view. There are apparently no Punjab cases in point and I will therefore discuss the point on its merits.

Section 94, Criminal Procedure Code, authorizes a Criminal Court, which considers that the production of any document or other thing is " necessary or desirable " for the purposes of any investigation, enquiry, trial or other proceeding under the Code, to issue, to the person in whose possession or power the document or thing is believed to be, a summons to produce it. Section 96 of the Code goes a step further. If the Court thinks the person in possession or having power over the document or thing will not voluntarily produce it upon a summons or notice, or if it does not know in whose possession or power the document or thing is, or if it thinks that the purposes of justice will be served by a general search or inspection, it may issue a search warrant.

The facts are stated in the reference and need not be repeated here.

The learned District Magistrate's request is that a search warrant be issued under section 96, Criminal Procedure Code,

- (1) (1887) *I. L. R.* 15 *Cal.* 109 (*Mahomed Jackariah and Coy. v. Ahmed Mahamed*).
- (2) (1910) *I. L. R.* 38 *Cal.* 304 (*Bajrangji Gope v. Emperor*).
- (3) (1913) *I. L. R.* 41 *Cal.* 261 (*Bissar Misser v. Emperor*).
- (4) (1912) *I. L. R.* 37 *Mad.* 112 (*In re S. Kondareddi*).
- (5) (1908) 12 *Cal. W. N.* 1016 (*Ishwar Chandra v. Emperor*).
- (6) (1911) 9 *Indian Cases* 561 (*Raj Chundra v. Hara Kishore*).
- (7) (1903) 5 *Bom. L. R.* 980 (*In re Lakshmidas*).

to be followed by inspection by the prosecution of the books found. Against this, accused's counsel urges that sections 94 and 95, Criminal Procedure Code, cannot be used directly against an accused person, who must not be asked or compelled to produce matter which would incriminate himself. But I can find no such limitations in those sections

No doubt in *I. L. R. 38 Cal. 304* (1) it was ruled that an accused person cannot be prosecuted under section 175, Indian Penal Code, for disobeying a summons under section 94, Criminal Procedure Code, but, as pointed out in *I. L. R. 41 Cal. 261* (2), this is not the same as saying that a search warrant to find things likely to throw light on the case against an accused person cannot be issued for the search of his premises. There is nothing in the wording of section 96 to warrant such an idea, and it is immaterial what may be the law of England on the subject. The learned counsel affirms that the law of England is against the District Magistrate: it may be so, but what we have to do is to administer the law of British India.

9 I. C. 564 (3), seems to me an incorrect exposition of that law. It quotes no authority, and while it is oracular, it is brief and contains no explanation how and where the supposed limitation of the powers of the Courts comes into the section. The head-note is defective inasmuch as it confounds the question of a warrant addressed to the accused with that of a warrant against the accused; and altogether I am not disposed to look upon this ruling as a valuable authority.

12 C. W. N. 1016 (4), on the other hand, seems to me, with all deference, to be based on a misunderstanding of sections 342 and 343 of the Code. The argument used therein, which is also pressed upon me here, is that these sections shew that the Legislature was anxious that an accused person should under no circumstances be compelled or unfairly induced to incriminate himself, and that calling upon an accused person to produce, or searching his house in order to procure, documents, etc., which the prosecution say would prove his guilt, would be an infringement of the spirit of the law. This argument does not appear to me to possess any force whatever.

No doubt section 342 and section 343, Criminal Procedure Code, are so framed as to prohibit all efforts on the part of the

(1) (1910) *I. L. R. 38 Cal. 304* (*Bajrangi Gope v. Emperor*).

(2) (1913) *I. L. R. 41 Cal. 261* (*Bissar Misser v. Emperor*).

(3) (1911) *9 Indian Cases 561* (*Raj Chandra v. Hara Kishore*).

(4) (1908) *12 Cal. W. N. 1016* (*Ishwar Chandra v. Emperor*).

Court, by pressure or by cleverly designed questions, to entrap the prisoner into making admissions against himself. An accused person is in a position of great danger and difficulty. He is usually an uneducated man of no very keen intelligence, and there is always a risk that, if he is searchingly and unfairly cross-examined, he may, even if innocent, in his efforts to find a way of escape from the charge against him, make statements, *which are not in accordance with the facts* but which in his clouded and perturbed mind may appear as being hopeful methods of evasion. This policy of the Legislature we can readily understand, we do not want in this country the procedure followed by the French *juge d'instruction*. But the issue of a search warrant, such as that asked for in the present case, is not in line with such procedure as that.

The Court is bound by all the means in its power to find out the *truth*. The truth here will very likely be ascertained with certainty by an examination of accused's books. He has no reasonable right to complain of such an examination. If he is innocent, his books will clear him. If he is guilty, why should the Court be debarred from seeing the best evidence of his guilt?

Under section 342 the Court can ask him questions. He is not bound to answer, and, if he answers falsely, he is not punishable therefor, though the Court may draw such inferences as it thinks just from his refusal or his answers. Here the Court is allowed to go as far as it is *possible* to go in the search for the truth. Similarly, in taking action under section 96, Criminal Procedure Code, the Court is authorized to go as far as is physically possible in that search. The accused can perhaps defeat the Court by concealing or destroying the document, etc., or by having it concealed or destroyed, taking, of course, the consequences of such action, just as the accused, in the dock can, when questioned, under section 342, thwart the Court in its search for the truth by answering falsely or refusing to answer. But the mere fact that the accused can so defeat or thwart the Court is no reason for holding that the Court is debarred from *going as far as the sections specifically allow*.

In short, to my mind the provisions of section 96, Criminal Procedure Code, are clear and simple, and I can see no reason for holding that the words "a person" in that section do not include the person accused in the case. Nor can I assent to the further contention that, when the premises to be searched are those of the accused person, the warrant can only be for

the finding of the document, etc., in respect of which the alleged offence has been committed, *e.g.*, the forged cheque or deed or the original of the libel. The words "document or thing" in the section are general and seem to me to cover *any* document the production and inspection of which are "necessary or desirable" or will serve the ends of justice.

For these reasons I allow this revision, set aside the order of the 1st class Magistrate and direct that a search warrant be issued as asked for by the District Magistrate and that thereafter the books, etc., found be open to inspection by the prosecution or by any experts appointed by the Court in this behalf. The 1st class Magistrate's difficulty about appointing commissioners to examine the books is an imaginary difficulty. The Court, *of course*, has the power to invoke the aid of persons capable of helping it to read and understand the contents of the books.

Revision allowed.

No. 37.

Before Hon. Mr. Justice Scott-Smith.

AGRA AND OTHERS—(CONVICTS)—APPELLANTS,

Versus

CROWN—(RESPONDENT).

Criminal Appeal No. 462 of 1914.

Indian Penal Code, sections 105, Part II, 147, 304 and 325—right of private defence of property—death caused by some only of the members of an unlawful assembly.

Held, that the provisions of section 105, Part II, of the Penal Code as to private defence of property apply only to *stolen* property, and not to property acquired dishonestly within the meaning of sections 403 and 411.

7 Cr. L. J. 49 (1) and I. L. R. 36 Cal. 296 (2), distinguished.

Held also, that acts done by some members of an unlawful assembly outside the common object of the assembly nor of such a nature as the members of the assembly could have known to be likely to be committed in prosecution of that object are only chargeable against the actual perpetrators of those acts.

Held further, that as it had not been proved which of the two assailants in this case had actually struck the one fatal blow neither could be convicted under section 304 of the Code, but that their offence fell under section 325.

I. L. R. 29 All. 282 (3), referred to.

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- (1) (1907) 7 Cr. L. J. 49 (*Jarha Chamar v. Surit Ram*).
 - (2) (1908) I. L. R. 36 Cal. 296 (*Baijnath Dhanuk v. Emperor*).
 - (2) (1907) I. L. R. 29 All. 282 (*Emperor v. Bhola Singh*).

Appeal from the order of Lala Radha Kishen, Magistrate, 1st class, exercising enhanced powers under section 30, Criminal Procedure Code, Lyallpur, dated the 21st May 1914.

Beechey, for appellant.

Assistant Legal Remembrancer, for respondent.

The judgment of the learned Judge was as follows :—

SCOTT-SMITH, J.—In this case 26 persons, appellants, have been convicted under section 304, Part II, Indian Penal Code, read with section 149, of culpable homicide of Ahmda, who died as a result of fracture of the skull caused by a blow inflicted upon him on the 25th of February 1914. Bahadra and Agra, appellants, who are said to have been the persons who actually struck the deceased, have been sentenced to seven years' rigorous imprisonment, and all the other appellants have been sentenced to three years' rigorous imprisonment each. Mr. Beechey has filed a joint-appeal on behalf of all the convicted persons and has argued for them all jointly. 13th Oct. 1914.

* * * * *

I consider, then, that it is established by the evidence that the 26 appellants went in a body to Mathela's *haveli* with the object of removing the buffalo which Hassu claimed and honestly believed to be his. I find that they did, in fact, remove the buffalo, and that, after they had gone some distance, they were followed by Mathela and Ahmda and that, then, probably some abuse was given on each side, and the four appellants named by prosecution witnesses, Agra, Bahadra, Allah Ditta and Moman, turned back and beat them. The other appellants took no active part in the beating.

Mr. Beechey urges that, even accepting this finding, his clients have committed no offence. His argument is that a man, whose cattle has been stolen, is entitled to seize them out of the possession of another man with whom he finds them and that, in order to effect his purpose, he is entitled to take with him a large body of other men. He bases his argument on section 105, Part II, Indian Penal Code, which lays down that—

“The right of private defence of property against theft continues till the offender has effected retreat with the property, or the assistance of the public authorities is obtained, or the property has been recovered.”

And, in support of his argument, he cites 7, Criminal Law Journal, page 49 (1) and *I. L. R.* 36 Cal., page 296 (2). In my opinion, the argument of counsel has no force.

In the present case there was no allegation that Mathela had *stolen* the buffalo. Hassu's report made on the 19th of February, *i.e.*, six days before the occurrence was, that his buffalo strayed away from the grazing ground. Under these circumstances the buffalo might have been misappropriated by somebody and might have changed hands several times, and Mathela might easily have acquired it in a perfectly honest manner.

In any case, it could not be said that he acquired it by theft, though he might possibly have received it dishonestly within the meaning of section 411, Indian Penal Code. The Code does not give any right of private defence of property in regard to which an offence under section 403 or 411,¹ Indian Penal Code, has been committed.

Moreover, in the present case there was obviously ample time for the appellants to have had recourse to the proper authorities with a view to recover the possession of the buffalo. Instead of invoking the proper authorities, they took the law into their own hands and went in a body to enforce Hassu's right or supposed right to the animal. Under these circumstances, I have no difficulty in holding that the appellants constituted an unlawful assembly within the meaning of section 141, Indian Penal Code.

The next question is, of what offence should the appellants be convicted. Mr. Broadway frankly admits that they could not all have been convicted of culpable homicide under section 304, Indian Penal Code. It cannot be said that that offence was committed in prosecution of the common object of the unlawful assembly; nor was it such as the members of that assembly knew to be likely to be committed in prosecution of that object. The very fact that the appellants went in such numbers would negative the idea that any such consequence as did occur was likely to take place.

The common object of the assembly was to take away the buffalo and when Mathela and Ahmda came up to get it back, force was used by some of the appellants in order to drive them away. This force was used in prosecution of the common object of the unlawful assembly, and therefore I hold that all the appellants are guilty of rioting.

(1) (1907) 7 Cr. L. J. 49 (*Jarha Chamar v. Surit Ram*).

(2) (1908) *I. L. R.* 36 Cal. 296 (*Bajinath Dhanuk v. Emperor*).

As regards Bahadra and Agra, it is proved that they attacked Ahmda, but, according to medical evidence, he only received one blow on the head, and there is no evidence to show which of these two appellants gave him that blow. Under these circumstances, and following *I. L. R. 29 All.*, page 282 (1), I am of opinion that neither of these two persons can be convicted of an offence under section 304, Indian Penal Code. I think, however, it can safely be held that, when they attacked him, they intended or knew that they were likely to cause him grievous hurt. I therefore accept the appeal, and, setting aside the order of the lower Court, convict Agra and Bahadra of an offence under section 325, Indian Penal Code, and all the other appellants of an offence under section 147, Indian Penal Code.

I do not think this is a case in which a heavy punishment should be given. At the same time the act of the appellants was a lawless one and was likely to lead to a serious fight. The sentences will be as follows: Two years' rigorous imprisonment each to Bahadra and Agra, and one year's rigorous imprisonment to each of the other appellants. These sentences will not include any solitary confinement.

The appeal is accepted and the convictions are altered and the sentences reduced as above stated.

Appeal accepted.

No. 38.

Before Hon. Mr. Justice Shadi Lal.

CROWN

Versus

KHUDA BAKHSH—ACCUSED.

Criminal Revision No. 1424 of 1914.

Workmen's Liability Act, XIII of 1859—contract to perform agricultural service and prescribing a penalty for its breach.

Held, that Act XIII of 1859 does not apply to a contract to perform agricultural services.

I. L. R. 7 Bom. 379 (2), followed.

Held also, that the remedy prescribed by the Act cannot be enforced where the contract itself prescribes a penalty for its breach.

96 P. L. R. 1914 (3), followed.

(1) (1907) *I. L. R. 29 All. 282 (Emperor v. Bhola Singh)*.

(2) (1883) *I. L. R. 7 Bom. 379 (Empress v. Bhagwan Bhirsan)*.

(3) *96 P. L. R. 1914 (Emperor v. Muhammad Din)*.

Case reported by S. S. Harris, Esquire, Sessions Judge, Multan Division, with his No. 190 J., dated the 16th July 1914.

The facts of this case are as follows :—

It is alleged that the complainant made an advance of Rs. 110 to Khuda Bakhsh, accused, to perform agricultural work on a certain well and got a bond written from him. The accused neither worked for him for a single day nor repaid him the advance money.

The accused, on conviction by Mirza Nawazish Ali, exercising the powers of a Magistrate of the 1st class in the Muzaffargarh District, was sentenced, by order, dated 9th June 1914, under section 12 of Act XIII of 1859, to three months' rigorous imprisonment.

The proceedings are forwarded for revision on the following grounds :—

The Magistrate recorded the statement of Murad, complainant, when the complaint was instituted and thereafter summoned Khuda Bakhsh. On the appearance of the latter the Magistrate recorded his statement and at once passed the order which is under revision, sentencing Khuda Bakhsh to 3 months' rigorous imprisonment. The Magistrate did not ask the complainant what his wishes were and did not order Khuda Bakhsh to repay the advance made or to perform the work according to the terms of the contract, as required by section 2 of Act XIII of 1859. The order of the Magistrate is, therefore, not according to law.

2. The contract provides a penalty of Rs. 50 for non-performance of the contract, the employer therefore could not adopt an alternative remedy by proceeding under Act XIII of 1859, see *P. L. R.* 96 of 1914 (1).

3. The contract is to perform agricultural duties, such a contract does not come under Act XIII of 1859—see *I. L. R.* 7 Bom. 379 (2).

For the above reasons I recommend that the order of the Magistrate be set aside and that Khuda Bakhsh be discharged from his bail bond on which he has been released pending the orders of the Chief Court.

(1) 96 *P. L. R.* 1914 (*Emperor v. Muhammad Din*).

(2) (1883) *I. L. R.* 7 Bom. 379 (*Empress v. Bhagvan Bhirsan*).

The order of the Chief Court was as follows :—

SHADI LAL, J.—The accused entered into a contract with the complainant to perform agricultural work for the latter, received an advance of Rs. 110 and stipulated to pay a penalty of Rs. 50 in the event of the non-performance of the service. On these facts, it is quite clear that the provisions of Act XIII of 1859 do not apply to the case. 21st Oct. 1914.

In the first place, the preamble and other provisions of the Act show that it was not intended to apply to a contract to perform agricultural service (*vide I. L. R. 7 Bom. 79*) (1).

In the second place, the judgment of this Court in Criminal Revision No. 616 of 1913 (96 *P. L. R.* 1914) (2) is an authority for the view that where a contract prescribes a penalty for its breach, the remedy prescribed by Act XIII of 1859 cannot be availed of.

For these reasons, I accept the application for revision and set aside the order of the Magistrate.

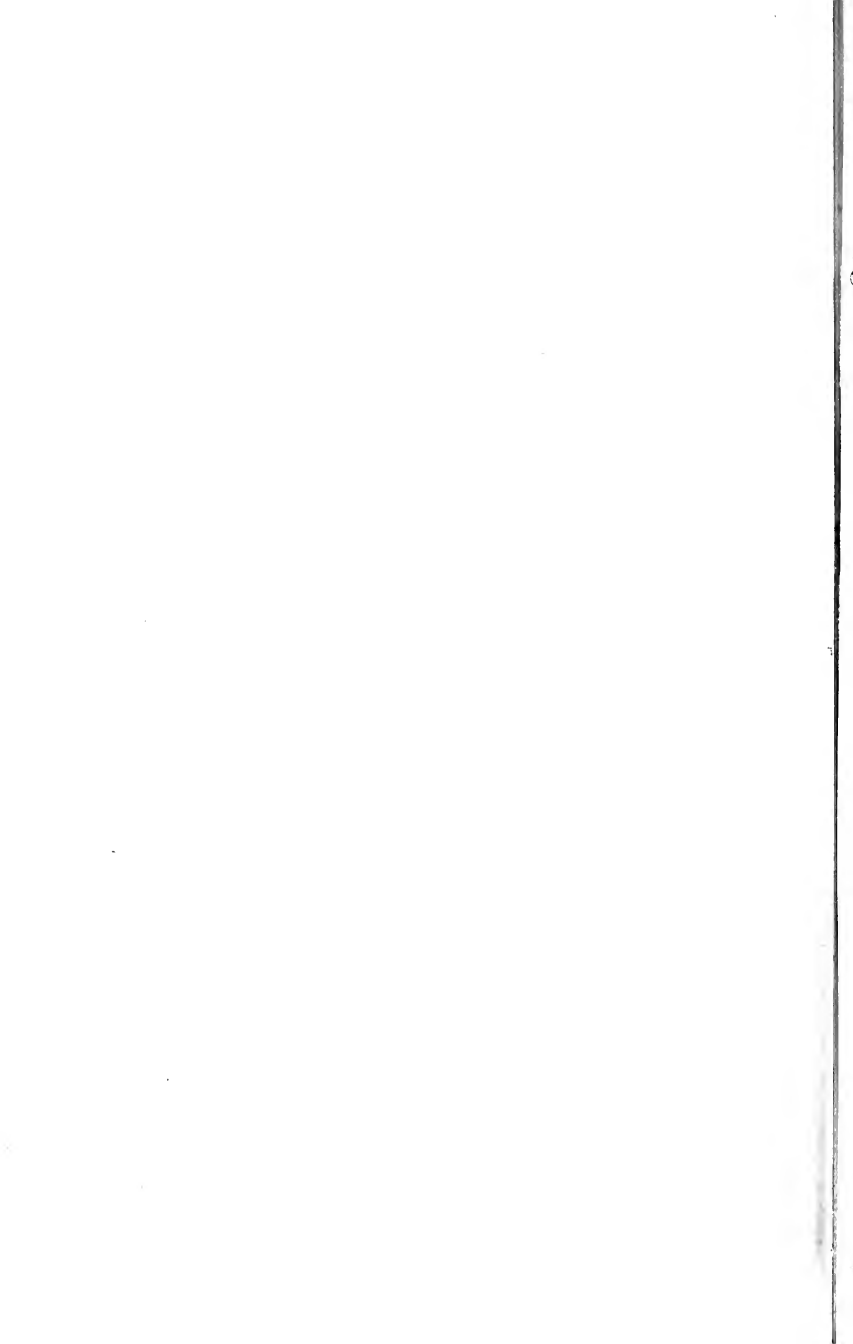
Revision accepted.

(1) (1883) *I. L. R. 7 Bom. 379* (*Empress v. Bhagvan Bhivsan*).

(2) 96 *P. L. R.* 1914 (*Emperor v. Muhammad Din*).



REVENUE JUDGMENTS,
1914.



Financial Commissioner, Punjab.

REVENUE JUDGMENTS.

No. 1.

Before Hon. H. J. Maynard, Financial Commissioner.

MAHAN SINGH AND OTHERS—(PLAINTIFFS)—
PETITIONERS

Versus

NARAIN SINGH AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Revenue Revision No. 122 of 1913-14.

Punjab Tenancy Act, XVI of 1887, section 48 (5)—Financial Commissioner's power of revision—when exercised.

Held that the circumstances which would justify the Court of the Financial Commissioner on its revision side, in holding that a subordinate Court had acted either without jurisdiction or illegally or with material irregularity, when on the facts found by that Court there is no such lack of jurisdiction and no illegality or material irregularity, would have to be of a very exceptional kind, such as, *e. g.* absolute perversity in the finding or a serious misapplication of the law of evidence in arriving at it, and that the broad principle to follow is to interfere only when a refusal to interfere would result in injustice or failure of justice.

2 P. R. (Rev.) 1910 (1), referred to.

Held consequently, that there is no ground for interference in the present case where two Courts have found as a matter of fact, supported by the Revenue Records that the relation of landlord and tenant exists between the parties and there is no suggestion that this decision has resulted in injustice.

Case forwarded for order by P. J. Fagan, Esquire, Commissioner of Jullundur, with his remarks, dated the 16th March 1914.

The order of the learned Financial Commissioner was as follows :—

MAYNARD, F. C.—The land in respect to which the present 14th April 1914.
suit has been brought is a portion of Nahri Nauranga which

came by partition proceedings into the share of the defendants-respondents. Proprietary possession of the land was delivered to them in 1909 by the order of the Court ; but, as the plaintiffs-applicants are not owners of Nahri Nauranga, but only of the adjoining village of Nahri Khalsa, it is understood that they were not parties to the partition proceedings. Owing to the intermixture of the lands of the two villages, they appear to have claimed rights in this area and they resisted the occupation of the defendants and interfered with the tenants put in by the latter. But the respondents are shown in the Revenue Records as having proprietary possession, in accordance with the orders in the partition proceedings and they sued for the ejectment of the plaintiffs (applicants), which the original and appellate courts have ordered.

The original and appellate courts have found that the plaintiffs (applicants) have not succeeded in rebutting the presumption established by the Revenue Records that the defendants are owners and the plaintiffs tenants-at-will. That is to say, there is a finding of fact, supported by the Revenue Records, that the relation of landlord and tenant exists between the parties.

The learned Commissioner regards the decision as equitable. But having regard to the history of the case and to the circumstances in which the plaintiffs took possession, he does not think that the facts justify the finding that the relation of the landlord and tenant exists between the parties. That is to say, as I understand, he regards the possession of the plaintiffs as adverse, under the colour of proprietary rights, and the ejectment proceedings in the Revenue Courts as bad in law. He therefore refers the case for orders on the revision side.

His order of reference suggests the possibility that a person in the possession of land occupied without the consent of the landlord, in the circumstances specified in section 14 of the Punjab Tenancy Act, might be held to be a tenant, and therefore liable to ejectment proceedings. I need only say here that it is most improbable that such an interpretation of section 14 would be upheld, as the reason for inserting that section is to provide for the case of a trespasser who is not a tenant. If the facts of the present case had been found to be what I understand the Commissioner to consider them to be, there could, I think, have been little doubt as to the law applicable to them. The plaintiffs-applicants having been found to be in adverse possession of land which was made over to the defendants in

partition proceedings to which the plaintiffs were not parties, would not have been liable to ejectment proceedings under the Punjab Tenancy Act.

The question before me, however, is whether, for the sake of a ruling on a point of law which is not seriously in question, I should, as a Court of revision, reverse the concurrent finding of two Courts on a point of fact, which has the support of the Revenue Records and whether I should do this notwithstanding that the decision based upon this finding is regarded by the Court which makes the reference as an equitable one.

Applications, on the revision side, from disappointed parties to revenue litigation, are very numerous and in the majority of them the grounds put forward might serve as grounds of appeal, if appeal were permissible, but are not, and hardly ever affect to be, grounds for the exercise of so exceptional a jurisdiction as that of the Financial Commissioners on the revision side.

The revisional jurisdiction of the High Court is limited by section 115 of the Civil Procedure Code to cases in which a subordinate Court appears to have exercised a jurisdiction, not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, but it has always been recognised that the Financial Commissioner, acting under section 84 (5) of the Punjab Tenancy Act, has within the limits prescribed for the revisional jurisdiction of the Chief Court, an absolute discretion to determine whether his intervention is expedient. There is a succession of rulings on this point and in Punjab Record No. 2 of 1910 (1), it was very clearly and in very general language ruled, that the broad principle to follow is, to interfere only when a refusal to interfere would result in injustice or failure of justice.

In the present case there are two distinct reasons for declining to exercise the revisional jurisdiction. In the first place, there is, on the part of two Courts a definite finding supported by the Revenue Records of facts which give jurisdiction to the Revenue Courts and render the plaintiffs-applicants liable to ejectment. The circumstances which would justify this Court, on its revision side, in holding that a subordinate Court had acted either without jurisdiction or illegally or with material irregularity, when, on the facts found by that Court there is

no such lack of jurisdiction and no illegality or material irregularity, would have to be of a very exceptional kind: though absolute perversity in the finding, or a serious misapplication of the law of evidence in arriving at it, might justify such interference. Apart from this point, there is no suggestion that the decision of the subordinate Courts in the present case has resulted in injustice.

The application is rejected.

Revision rejected.

No. 2.

Before Hon. H. J. Maynard, Financial Commissioner.

RUGHA—(PETITIONER)

Versus

MUGHLI AND OTHERS—(RESPONDENTS).

Revenue Revision No. 176 of 1913-14.

Punjab Tenancy Act, XVI of 1887, sections 38 and 59 (1) (b) and (c)—abandonment of occupancy rights by widow—succession by male collaterals—abandonment by the collaterals by not cultivating for more than a year—before taking possession.

Held that if a widow, who has succeeded to occupancy rights, abandons the tenancy by non-cultivation within the scope of section 38 of the Tenancy Act, the occupancy rights at once devolve on the next claimant, *vide* section 59 (1) (b) and (c).

Held also that the next claimant does not become a "tenant having the right of occupancy," within the meaning of section 38, until he has entered into possession and consequently cannot be held to have abandoned his occupancy right under that section before that time (1).

Case forwarded for the orders of the Financial Commissioner by Lieut.-Colonel C. M. Dallas, C. S. I., Commissioner, Ambala, with his order, dated 5th March 1914.

Dwarka Parshad for petitioner.

Fazal Ilahi for respondents.

The order of the learned Financial Commissioner was as follows :—

MAYNARD, F. C.—The parties are represented before me by counsel. A widow who had succeeded to occupancy rights held by her deceased husband left the village in which the land was situated. The prior nature of the arrangements which she made for the cultivation of the land and the manner in which effect was given to them are not entirely clear from the file. Apparently the person whom she employed to cultivate for her continued to cultivate on behalf of the landlords. At any rate the owners (who are the co-sharers in the village) say that they regularly received rent from the tenant Shahzada, though the language employed appears to amount to a contention that he is cultivating on their behalf and not on behalf of any occupancy tenant.

6th May 1914.

The landlords claimed in mutation proceedings that the name of the widow should be removed from the column of occupancy and this claim was upheld as far as the Collector's Court. The Commissioner has referred the case for revision on the

(1) [*Cf.* 44 P. R. 1891 (F. B.) (*Joti v. Maya*) Ed.]

ground that the act of the widow did not affect the rights of the collaterals, who are admittedly descended from the ancestor who originally held the tenancy.

The widow having left the village some years ago, a fresh entry of some sort is necessary, and the question is what it should be.

The rights of a widow in an occupancy tenancy are very strictly limited by law. She cannot transfer the right by sale, gift, or mortgage, or even by sub-lease for a term exceeding one year. It would be somewhat surprising if, in these circumstances, a mere act of neglect on her part would suffice to destroy the rights of persons who are protected by law against her wilful disposal of the property.

Clause (b) of section 59 (1) makes the legal position clear, abandonment, like ejection, terminates the rights of the widow, and the right of occupancy at once devolves upon the next claimant. At the very moment that the widow completed the period required to bring section 38 of the Punjab Tenancy Act into operation, she ceased to be "the tenant having the right of occupancy" by the operation of section 59 (1) (b).

An attempt has been made before me to show that the collaterals were themselves guilty of abandonment, because they did not at once enter upon and manage the tenancy. It appears that they misunderstood this legal position and thought they must wait till the widow's absence had lasted a stated number of years. Be this as it may, it is clear that a person who has never been in actual possession of a tenancy has not the opportunity of cultivating and arranging for the cultivation of the land of which it consists : and I hold that in order to establish the conditions contemplated by section 38, the tenant whose abandonment of his tenancy is alleged, must have been at some time in possession of the tenancy in question.

I accept the application and order mutation of the occupancy tenancy in the names of the collaterals of the deceased tenant Niadar : with costs in favour of the applicant.

Revision accepted.

No. 3.

Before Hon. Mr. H. J. Maynard, Financial Commissioner.

BAHADARI AND BAGARI—PETITIONERS,

Versus

CROWN—RESPONDENT.

Revenue Revision No. 181 of 1913-14.

Canal colonies—grantee's liability of personal residence—existence of a habitable house—sufficient proof, after colony has been firmly established.

Held that after a new colony has been in existence for twelve or fifteen years and has become firmly established, a grantee, who has not acquired proprietary rights, retains his technical liability to fulfil the condition of personal residence, but the existence of a habitable house should be accepted as sufficient evidence of residence and further inquisition into the habits of the grantee should be avoided.

Revision from the order of H. A. Casson, Esquire, C.S.I., Commissioner of Lahore, dated the 23rd December 1913.

The order of the learned Financial Commissioner was as follows :—

MAYNARD, F. C.—The facts of this case are that the ousted *25th March 1914.* grantees have a substantial house in the Chak which is fit to live in and is provided with all necessary furniture. From the lambardars' statement in vernacular it appears that the applicants have paid their share of expenses incurred in the building of the village mosque and the village drinking well.

Not having obtained proprietary rights, they were technically liable to be ousted by reason of their non-residence, and an order of confiscation was passed against them on March 28th, 1913. The house is said to have been built 15 or 16 years ago, and I gather that the grant which has now been confiscated dates back to the early days of settlement on the Rakh Branch of the Lower Chenab Canal.

For the first 12 or 15 years of a new colony's existence, the settlement is in some measure precarious, and there is special justification for insisting meticulously on the condition of residence. Later on, when the colony is firmly established, the absence or presence of a particular grantee becomes a matter of little or no public importance.

If he has not acquired proprietary right, he retains, no doubt, his technical liability to fulfil the condition of personal residence: but it becomes very undesirable to enforce this by confiscation, and the proper course is to accept the existence of a habitable house as sufficient evidence of residence, and

to make no further inquisition into the habits of the grantee. One great objection to the continuance of enquiries of this kind is the very undesirable power which they place in the hands of subordinate officials.

I hold, therefore, that the time has now come throughout the whole of the Lower Chenab Colony when the fact that a grantee has a habitable house in his Chak must be accepted as conclusive evidence that he is fulfilling the condition of residence. In order to apply this principle in the present case, enquiry will be made as to the disposal of the square which was confiscated, and restoration will be ordered, if feasible.

Revision allowed

No. 4

Before Hon. H. J. Maynard, Financial Commissioner.

HIRA AND OTHERS—(JUDGMENT-DEBTORS)—PETITIONERS,
Versus
 NIHAL SINGH AND OTHERS—(DECREE-HOLDERS)—
 RESPONDENTS.

Revenue Revision No. 121 of 1913-14.

Punjab Tenancy Act, sections 45 and 84 (5)—notice of ejectment against tenants—suit to contest notice dismissed in default—no decree for ejectment of tenants—tenants ejected notwithstanding in execution proceedings—Revision.

The landlords (respondents) caused notice of ejectment under section 45 (1), Punjab Tenancy Act, to be served on the tenants (petitioners). It had previously been held in judicial proceedings that the tenants were not liable to ejectment from one of the fields No. 743, but this was overlooked in dealing with the notices of ejectment.

The tenants sued to contest the notice and obtained an *ex parte* decree which was however set aside subsequently and when the case came up again the tenants absented themselves and their suit was dismissed in default.

In passing orders the Court did not direct the ejectment of the tenants under section 45 (6) of the Act. In execution proceedings possession was however given to the landlords.

Held, that a technical irregularity, such as the court's omission to direct the ejectment of the tenants may have been, is not a good ground for interference by the Financial Commissioner on the revision side, such interference being only justified where it is necessary in order that substantial justice may be done.

Held also, that the fact that the ejectment proceedings were twice in succession decided otherwise than upon the merits did not justify such interference in the absence of any indication of material irregularity.

Held, however, that the wrongful inclusion in the notices of ejectment of the field No. 743 and the subsequent delivery of possession of this field was a material irregularity and must be rectified.

Case forwarded for the orders of the Financial Commissioner by P. J. Fagan, Esquire, Commissioner, Jullundur, with his order, dated 16th March 1914.

Nemo, for petitioner.

Kishan Chand, for respondent.

The order of the learned Financial Commissioner was as follows :—

MAYNARD, F. C.—The applicant did not wish to be represented before me in this case. I have heard counsel for the respondents. 5th May 1914.

The facts, in so far as they affect the present proceedings are these. The respondents (landlords) caused a notice of ejectment under section 45 (I) of the Punjab Tenancy Act to be served upon the applicants in respect to certain land. One of the fields (No. 743) which was included in this notice had been held in previous judicial proceedings to be a part of the land from which the applicants (tenants) are not liable to ejectment. This important fact appears to have been overlooked in dealing with the notice of ejectment.

The tenants sued to contest their liability to ejectment, and obtained an *ex parte* decree in their favour : but this *ex parte* decree was set aside on 20th March 1911. When the case came up, it was, on this occasion, the tenants who absented themselves from the Court, and on this occasion their suit was dismissed in default.

In passing orders, the Court did not direct the ejectment of the tenants in accordance with section 45 (6) of the Punjab Tenancy Act and the Commissioner is of the opinion that this omission was a technical irregularity. Notwithstanding the absence of any specific direction of ejectment, possession was given to the landlords (respondents) by proceedings in execution of decree.

In referring this case for action on the revision side the Commissioner is, if I understand him correctly, influenced by two considerations, over and above that of the irregularity in the form of the decree, which he describes as technical only. One of these considerations is that the case has never been tried on the merits, and the other is that the ejectment proceedings included field No. 743, which, as already noted, had been held to be land from which the tenants (applicants) were not liable to ejectment.

In regard to the omission of the direction for ejectment from the order of dismissal, I may say that the definition of decree in section 2 of the Civil Procedure Code (from which an order of dismissal for default is expressly excluded) makes it somewhat doubtful whether there is any technical irregularity at all. It is however not necessary to determine this point, because a technical irregularity is certainly not a good ground for interference on the revision side.

It has been laid down more than once, and I take this opportunity of restating the doctrine, that the Financial Commissioner will exercise his powers under section 84 (5) of the Punjab Tenancy Act (within the limits set by the Civil Procedure Code to the revisional jurisdiction of the Chief Court) only when interference is necessary in order that substantial justice may be done.

What happened in this case was that the tenants contested their liability to ejectment, but failed to establish their contention. If we leave out of account, for the moment, the other aspects of this case, it seems clear that broad considerations of justice call for the decision, either—

- (1) that the original notice of ejectment which the tenants contested holds good in consequence of their failure in the proceedings, or
- (2) that the order of the Court carried with it a direction of ejectment, and that the successful litigant should not suffer from a technical irregularity (if there was a technical irregularity) for which the Court and not he was to blame.

The fact that the ejectment proceedings were twice in succession decided otherwise than upon the merits, does not justify interference, upon the revision side, in the absence of any indication of material irregularity. Against the decision dismissing their claim in default, the tenants applied unsuccessfully for a review; and their subsequent appeal was also rejected. There is no reason why the Financial Commissioner should upset the decision now.

The one material irregularity in the proceedings was the careless inclusion in the notice of ejectment, and in the subsequent delivery of possession, of field No. 743. I set aside so much of the proceedings as dealt with field No. 743 and order the restoration of the possession of that field to the tenants (applicants). In all other particulars, the application is rejected. I pass no order as to costs.

No. 5.

Before Hon. Mr. H. J. Maynard, Financial Commissioner.

NATHU—PETITIONER,

Versus

BISHNA AND OTHERS—RESPONDENTS.

Revenue Revision No. 191 of 1913-14.

Res-Judicata—Civil Procedure Code, 1908, section 11—whether applicable to orders by Revenue officers in partition cases—Punjab Land Revenue Act, XVII of 1887, section 115—discretionary powers of Revenue officers, explained.

Held, that section 11 of the Code of Civil Procedure does not apply to orders passed by Revenue officers in partition cases.

6 P. R. (Rev.) 1868, referred to.

Held also, that a Revenue officer has discretionary authority under section 115 of the Punjab Land Revenue Act, to disallow an application for partition and that he ought to use this authority in every instance in which the same question has been previously decided, unless it is shewn that the circumstances, which made the previous order appropriate, have changed.

Revision from the order of Lt. Col. C. M. Dallas, C. S. I., Commissioner of Ambala Division, dated the 14th March 1914.

Mahabir Pershad, for petitioner,

Dawarka Pershad, for respondents.

The order of the learned Financial Commissioner was as follows :—

MAYNARD, F. C.—I have heard pleaders for the parties. It is admitted that on 14th October 1909 the Assistant Collector of Rupar rejected an application for the partition of the same land which is the subject of the present proceedings. The order against which this application has been lodged is one affirming upon appeal the Collector's order that partition of the land shall proceed, if Nathu (present applicant) fails to sue to establish proprietary right on 2 bighas of it by a stated date. And the issue before me is virtually this, whether, by virtue of section 11 of the Civil Procedure Code or by any other principle of law, the order rejecting the partition in 1909 renders illegal the order permitting the partition in 1913.

It is plain enough that a Revenue Officer acting as a Civil Court under section 117 (2) of Act XVII of 1887 is properly described as a Court trying a suit and that if, in this capacity, a Revenue Officer had decided a partition question in issue between the parties to partition proceedings, section 11 of Civil Procedure Code, embodying what is commonly described as the principle of *res judicata*, would be a bar to the re-decision

22nd July 1914.

(1) 6 P. R. (Rev.) 1868 (*Mullik Futeh Sher Khan v. Mullik Sher Bahadoor Khan*).

of the same question between the same parties. The position is, however, an entirely different one when the Revenue Officer is acting, not as a Court under section 117 (2), but merely as a Revenue Officer dealing with an application for partition. In this capacity, he acts as an administrative authority, not as a Court, the proceeding is an administrative adjustment, not a suit, and the decision is embodied in an order, not in a decree. As was held by the Financial Commissioner in Punjab Record No. 6 of 1868 (1), where the question in issue was the form in which a jagirdar was entitled to collect revenue, and the claim had been disallowed in 1862, I hold that the matter is an administrative one, to which the principle of *res-judicata* as embodied in section 11 of the present Civil Procedure Code has no application.

The pleader for the applicant has not felt able to argue before me that section 11 of the Civil Procedure Code bars the re-decision in 1913 of the question whether partition should be allowed, but he has urged, with very good reason, that there must be some finality about the orders of Revenue Officers, and that it would be most inconvenient and improper if every one who had been disappointed over an application for partition were at liberty to start fresh proceedings over the same issue.

There is no doubt that this contention is correct. But the decision that section 11 of the Civil Procedure Code has no application to the partition orders of Revenue Officers does not connote a decision that such orders will henceforth have no legal finality. Under section 115 of the Land Revenue Act, a Revenue Officer has discretionary authority absolutely to disallow an application for partition: and he ought to use this authority in every instance in which the same question has been previously decided, unless it is shown that the circumstances which made the previous order appropriate have changed.

A very common instance of a change of circumstances affecting the propriety of a partition is the introduction into a village of a new means of irrigation: converting unculturable land into culturable land. But changes in methods of cultivation, whatever the cause, must always tend to carry with them changes in the manner in which land is held: and the recent discovery in the north-west of the Punjab that barani cultivation with profit is possible over extensive areas where it was formerly regarded as hopeless, is another instance of a change which may make

it reasonable, and even necessary to allow partition of areas where partition has formerly been disallowed.

In the present case I find that the refusal of partition in 1909 was based upon the belief that the point in dispute between the parties could, and would, be appropriately dealt with by action under section 150 of the Land Revenue Act. It was supposed that Nathu, the present applicant, was prepared to surrender certain land which was in his possession. His subsequent proceedings showed, that this was not the case, for he obtained from a Civil Court a decree that he was entitled to retain possession of that land until partition should take place.

In the circumstances I hold that the officers who dealt with the application in 1913 were justified in declining to exercise their discretionary authority to disallow partition notwithstanding the opposite decision in 1907. I reject the application for revision.

Revision rejected.

No. 6.

Before Hon. H. J. Maynard, Financial Commissioner.

NAWAB ALI AND ISMAIL—(DEFENDANTS)—

PETITIONERS,

Versus

LAL SINGH—(PLAINTIFF)—RESPONDENT.

Revenue Revision No 145 of 1913-14.

Punjab Tenancy Act, XVI of 1887, section 8—acquisition of occupancy rights by tenants breaking up waste—Mauza Ganga, Tahsil Sirsa.

Held, that the decision in Revenue Case No 406 of 1897-98 by Thorburn F. C. did not establish a new principle of law conferring occupancy rights under section 8 of the Tenancy Act on all tenants in the old Sirsa district who had broken up waste prior to 1882 but provided merely a new criterion by which each claim to such rights might equitably be decided in the absence of any express clause in the administration paper of the village conferring such rights.

Held also, that the application of the said criterion depends upon the particular facts of each case and that the question at issue in every such case is one of fact, whether the circumstances, and in particular the rate of rent paid, point to the conclusion that at the time when the waste was broken up tenants were so scarce as to be in a position to dictate their own terms. In cases where the breaking up of waste took place prior to 1882 the probability that tenants were so scarce is greater than in cases where it took place later, but the probability is not to be taken as a certainty in any case and all the circumstances must be examined.

Rev. Cases No. 5 of 1881-82 (unpublished) and No. 493 of 1897-98 (1), referred to.

Revision from the order of Lt-Col. C. M. Dallas, C.S.I., Commissioner, Ambala Division, dated the 24th January 1914.

The order of the learned Financial Commissioner was as follows :—

12th August 1914

MAYNARD, F. C.—I have heard the parties in this case. The applicants are tenants in *Manza Ganga* of *Tahsil Sirsa*, and the land in dispute was broken up by them partly before and partly after 1882, while a portion of it was not broken up by them at all but received by them in an already cultivated state. The landlord having sued for possession by ejectment, the tenants sued for occupancy rights, which all the lower Courts have found that they have failed to establish.

As in many villages of the *Sirsa Tahsil*, the administration paper of the settlements both of 1862 and 1882 contain a clause which sets forth the right, in the first place of the owners, and in the second place of the occupancy tenants, to break up waste and adds that, if these be unwilling, the right will be given to some one else. In the fifth ground of the application for revision, the applicants refer to this clause and claim it as establishing their rights of occupancy.

A clause of the same character in the administration paper of the village of *Diwan Kheora* in the *Dabwali Tahsil* of the old *Sirsa District*, came under the consideration of the Financial Commissioner, Sir J. Lyall, in case No. 5 of 1881-82. He observed that there was nothing in the rule expressly declaring that an occupancy tenant, obtaining and cultivating waste land under the clause, would acquire a right of occupancy in it. But in the circumstances of the particular case (which was one of first founding in 1853 and a subsequent refounding in 1861 after abandonment in consequence of drought) Sir J. Lyall held that tenants of the village, classed as occupancy tenants at the Settlement of 1852, who had been allowed to break up waste land under this clause within the term of the expiring Settlement (1862-1882) were entitled to a right of occupancy in the lands broken up.

In case No. 406 of 1897-98 a similar case connected with occupancy rights in the same tract came before Mr. Thorburn, then Financial Commissioner. In the course of his judgment Mr. Thorburn observed :—

“ Considering the fact that clause 6 only gave the right to break up waste, but is silent as to what status such *butanari*

confers, it cannot be held that *butamari per se* confers an occupancy right. As to whether it does or not, must turn on whether or no at the time *butamars* were scarce, in a position, so to say, to make their own terms and the advantages of getting new land brought under the plough were great to the land-owners. A decision on this point will partly depend on the rents taken."

In the particular case then under his consideration, Mr. Thorburn decided that each plaintiff was "entitled to occupancy rights under Section 8, Punjab Tenancy Act, in respect of all land broken up and since held by him or his predecessor in interest in or before 1882, and that, in respect of lands subsequently broken, the question depends on the finding of fact as to in what year from any cause the competition changed from one for tenants on any terms almost, to one for land amongst tenants on such terms as the landlords chose to dictate."

In the case now before me the second ground of revision amounts to a claim that this judgment has established as a general principle of tenancy law for unirrigated villages of the old Sirsa District, that a tenant who has broken up land prior to 1882 is entitled to occupancy rights in that land. This claim is not limited to tenants who enjoyed occupancy rights in other land in the village prior to 1882 and in this case it is shown that the father of the applicants had no such rights in this village prior to the Settlement of 1882.

The Assistant Collector who originally decided against the applicants held that, in the present instance, there was not the slightest reason to suppose that there was any scarcity of tenants when their father broke up the land now in dispute and added that the rent rate (which, as pointed out by Mr. Thorburn, is an important consideration in determining whether the evidence points to a scarcity of tenants) is high. The rent rate is four annas and four pies per *pakka* bigha, equivalent to seven annas and two pies per acre, a rate which is certainly not particularly low for barani lands in the Sirsa District and was double the land revenue rate in this village. In rejecting the application for revision the Commissioner observed that the real point was "whether at the time that this land was first broken up and occupied by appellant or his ancestors, the competition for land was such that the tenant could make his own terms, or such that the landlord could do so, *i.e.*, was land scarce or were tenants scarce, and he held that the facts established that the

tenant was, at the time, in the less favourable position a conclusion from which there is no reason to differ.

Mr. Thorburn's decision in case No. 406 of 1897-98 did not establish a new principle of law conferring occupancy rights under section 8 on all tenants in the old Sirsa District who had broken up waste prior to 1882. It merely provided a new criterion by which each claim put forward by such persons to the establishment of such rights might equitably be decided. The application of the criterion depends upon the particular facts of each case, and the question at issue in every such case is one of fact whether the circumstances, and in particular the rate of rent paid, point to the conclusion that at the time when the waste was broken up, tenants were so scarce as to be in a position to dictate their own terms. In cases where the breaking up of the waste took place prior to 1882 the probability that tenants were so scarce as to be in a position to dictate their own terms is greater than in cases where it took place later. But the probability is not to be taken as a certainty, in any case, and all the circumstances must be examined.

In the present case, there are no grounds of revision at all in respect to that portion of the land which was received by the applicants' father in an already cultivated state. In respect to the remaining land, the contention of the applicants fails for the reasons explained, and they have not proved the facts which are requisite in order to establish the occupancy status on the principle laid down in case No. 406 of 1897-98.

The application is rejected.

Revision rejected.

The orders in case No. 406 of 1897-98 referred to in the above judgment.

7th April 1899.

THORBURN, F. C.—From the Collector's return, dated the 16th February 1899, giving cover to a report by Mr. Humphreys, Assistant Collector, dated the 6th February 1899, both of which are to be read as part of this Court's judgment, the Assistant Collector's report from the words "Report *re* Collector's order, dated the 5th January 1899," the answers to the points referred, omitting for the moment No. 1, are as follows :—

(2) Registered occupancy tenants pay at a rate under Re. 0-6-0 the cultivated *bigha*, which is apparently the rate plaintiffs have paid out since last settlement (3) the partition

occurred in *Sambat* 1919 (A. D 1862), or 20 years before Mr. Wilson's Settlement of 1862 (4) no instances are established. As to (1), the translation of the *Wajib-ul-arz* filed shows that in paragraph 6 on "mode of breaking up *banjar*" the conditions were that the owners first and after them the occupancy tenants, "shall have the right to break up waste land and in the event of their refusing to do so, land will be given to another person." This clause was apparently originally inserted in the 1862 Settlement and repeated in that of 1882. Its broad and obvious intention was to encourage the breaking of waste by owners, occupancy tenants and outsiders put in by the *Lambarlar*, or owners in the order named. The condition suited owners as it brought them income, and it suited Government and was no doubt inserted at the instance of the Settlement Officer in 1862 in order to benefit Government to some extent by strengthening the village. Mr. Agnew, the Collector, makes a great point in this case, that the *Wajib-ul-arz* para. related only to "*shamilat-deh*" not *shamilat patti*." Had this been intended the intention would have been made clear, but from the omission and remarks just made, I am convinced that the "waste" referred to was, "waste" generally, whether held by the owners composing a village or only a part of a village, why in this case the partition took place in *Sambat* 1919 or A. D. 1862, twenty years before the 1862 entry was repeated in the 1882 Settlement. Here a question arises as to what rights the breaking up of waste conferred. Evidently if the return about rent rates is correct, it did not *per se* put occupancy tenants breaking up waste in as high a category as that in which they stood with reference to their older acquired lands for which they were recorded as occupancy tenants. It did not do so, because otherwise they would have been entered in the annual papers as occupancy tenants and not as tenants-at-will, and would have paid a lower rent than Re. 0-6-0 a *bigha*.

As to the alleged agreement on which the tenants rely, it was, if made, oral, and cannot be proved. As the same time some such agreement was usual, so long as there was plenty of waste and a scarcity of tenants. Indeed it is on the face of it improbable that a man would break up waste without a guarantee of possession at a limited rent rate for at least a term of years, without such a protection it is inconceivable that the occupancy tenants (plaintiffs in this case) would have extended their cultivation. I understand that in the approaching settlement there will be a large number of disputes of the present type, *i.e.*, the landlords will try to eject occupancy tenants and

others who have under a clause in the *Wajib-ul-arz*, such as the No. 6 in this case, broken up and cultivated waste, and the *butamars* will appeal to the *Wajib-ul-arz* entry as giving them occupancy rights. The reason why the question of status has become a burning question is either increase of population or more probably, as here, the fact that canal irrigation is being or has been extended to the village.

Considering the fact that clause 6 only gave the right to break up waste, but is silent as to what status such *butamari* confers, it cannot be held that *butamari per se* confers an occupancy right. As to whether it does or not, must turn on, whether or no at the time *butamars* were scarce, in a position, so to say, to make their own terms, and the advantages of getting new land brought under the plough were great to the land-owners. A decision on this point will partly depend on the rents taken. Applying the above principle to this case, it is clear that as the village was *barani*, a canal is only now I understand being brought to it and the demand for tenants great, up to 1882, at all events, land *personally* broken up, in or before 1882 and since cultivated by occupancy tenants, must be held to rest in them as occupancy tenants under section 8, Punjab Tenancy Act. This view I see is very much that taken by Mr. (Sir James) Lyall as Financial Commissioner in the Diwan Khera Case, appeal No. 5 of 1881-82

It follows then that these 4 revision petitions must be accepted.

Parties are summoned.

Final order:—

27th April 1899.

THORNBURN, F. C.—Parties are present and each represented by counsel. Mr. Brown for the respondents and Pandit Sham Das for the plaintiffs. For the landlords it is urged that the 1882 entry was a mere repetition and that had *butamari* conferred occupancy rights that status would have been recorded as held by the *butamari* and further that, as registered occupancy tenants pay at about Re. 0-3-0 a *bigha* and these men pay at Re. 0-6-0 or about that, the rent rate shows that they have no occupancy rights. For the tenants the entry is appealed to and the fact is pointed out that waste began to be broken up in 1872 and continued to be so broken until long after 1882. On the whole it is pretty certain that no close inquiry preceded the repetition of the old entry of 1862 in the revised *Wajib-ul-arz* of 1882 and that the *butamars* were not in 1882 given occupancy

rights because there was no judicial order conferring such rights and the entry itself was vaguely worded.

The conclusion to which I come is that each plaintiff is entitled to occupancy rights under section 8, Punjab Tenancy Act, in respect of all land broken up and since held by him or his predecessor in interest, in or before 1882, and that in respect of lands subsequently broken the question depends on the finding of fact as to in what year landlords had occasion to stop the further breaking of waste in their own interests, *i.e.*, in what year, from any cause, the competition changed from one for tenants, on any terms, almost to one for land amongst tenants at such terms as the landlords had to dictate.

I accept all four applications and, reversing Collector's order, decree plaintiffs' occupancy rights under section 8, Punjab Tenancy Act, in respect of all land broken up by them or those from whom the present tenants inherit up to 1882, the actual plots in each case having now to be ascertained and decided by the Collector and the Assistant Collector and as to later broken up land the question of fact has to be decided, *viz.*, the year in which landlords ceased to find it to their interest to get waste broken up at all by tenants with occupancy rights.

I refer back all four cases for inquiry and decision as the question of fact as regards each point to be decided. I may add here that counsel for defendants (landlords) admits that in this case the fact that land was *shamilat patti* and not *shamilat-deh* is immaterial. In any case the landlords were very few.







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